IN THE

# Supreme Court of the United States

OCTOBER TERM, 1942.

No. 554.

NATIONAL BROADCASTING COMPANY, INC., WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY and STROMBERG-CARLSON TELEPHONE MANUFACTURING COMPANY,

*Appellants,*

*vs.*

UNITED STATES OF AMERICA and the FEDERAL COMMUNICATIONS COMMISSION.

MUTUAL BROADCASTING SYSTEM, INC.,

*Intervenor.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

## BRIEF FOR APPELLANT NATIONAL BROADCASTING COMPANY, INC.

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This is an appeal from a final decree of a statutory three judge District Court for the Southern District of New York dismissing appellants' complaint on the merits.

The suit was brought by National Broadcasting Company, Inc. (hereinafter called NBC), the first nation-wide network organization, and by Woodmen of the World Life

Insurance Society and Stromberg-Carlson Telephone Manufacturing Company, two licensees of radio broadcasting stations, against the United States and the Federal Communications Commission. The purpose of the suit is to set aside an Order of the Commission in so far as it purported to become effective on November 15, 1941, on the ground that the Commission lacks power to make the Order and that the Order is arbitrary and capricious.

The complaint (R. 1) was filed in the District Court of the United States for the Southern District of New York on October 30, 1941, invoking the Court's jurisdiction under the Urgent Deficiencies Act and Section 402(a) of the Communications Act of 1934. Simultaneously with the filing of the complaint, appellants moved for a temporary injunction (R. 221). Appellees did not answer but moved to dismiss the complaint or, in the alternative, for summary judgment (R. 387). On these motions the District Court entered a final decree on February 21, 1942, dismissing the suit for want of jurisdiction over the subject matter, one judge dissenting (R. 470). Upon motion of appellants, the District Court granted a stay of the enforcement of the Order until May 1, 1942 or the argument of the appeal to this Court, whichever was earlier (R. 475).

An appeal having been taken to this Court, the final decree dismissing the suit for want of jurisdiction was reversed on June 1, 1942 and the cause was remanded for further proceedings (R. 476, 316 U. S. 447). The stay was continued upon terms to be settled by the District Court.

Appellees' motions to dismiss the complaint or, in the alternative, for summary judgment, together with appellants' motion for a temporary injunction, were again argued in the District Court before the same three judges on

October 8, 1942, and a final decree was entered on November 16, 1942, dismissing the complaint on the merits (R. 532). At the same time the District Court granted a stay of the enforcement of the Order until February 1, 1943 or the argument of the appeal in this Court, whichever is earlier (R. 533).

The petition for direct appeal to this Court was filed and allowed on November 25, 1942 (R. 534, 536).

## Opinions Below

The opinion of the District Court dismissing appellants' complaint on the merits (R. 522) is not yet reported.

The opinion of the District Court dismissing appellants' complaint for lack of jurisdiction over the subject matter (R. 456) is reported in 44 F. Supp. 688. The *per curiam* opinion of the District Court granting a temporary stay pending appeal from that dismissal (R. 473) is reported in 44 F. Supp. 696.

## Jurisdiction

The jurisdiction of this Court is invoked under Section 238 of the Judicial Code, as amended (28 U. S. C., Section 345), providing for the direct review by the Supreme Court of a final judgment or decree of a District Court of three judges under the Urgent Deficiencies Act, approved October 22, 1913 (38 Stat. 219, 220; 28 U. S. C., Sections 41 (28), 43 through 48, inclusive), as extended by Section 402(a) of the Communications Act of 1934 (48 Stat. 1064, 1093; 47 U. S. C., Section 402(a)).

This Court noted probable jurisdiction on December 14, 1942.

## Questions Presented

The questions presented on this appeal are whether the Federal Communications Commission has the power to promulgate the Order hereinafter described, whether the Order is arbitrary and capricious, and whether the District Court should have dismissed the complaint on the merits without holding a trial.

## Statutes Involved

The scope of the power of the Federal Communications Commission is specified in the Communications Act of 1934. The provisions of that Act pertinent to this appeal are set forth in Appendix A to this brief. They are:

Sections 3(h), 3(p), 4(i), 4(j), 301, 303, 307, 308, 309, 310, 311, 312, 313, 314, 319, 326 and 602(d).

Appellants also rely upon the First Amendment (which is read into the Communications Act of 1934 by Section 326 of that Act) and upon Article I, Section 1, of the Constitution of the United States.

## Statement

On May 2, 1941, the Commission issued its Report on Chain Broadcasting (R. 29), together with its original Order (R. 127) in proceedings entitled: "In the Matter of the Investigation of Chain Broadcasting, Federal Communications Commission, Docket No. 5060." On October 11, 1941, the Commission issued its Supplemental Report

(R. 201), together with amendments to its original Order (R. 213).

A chronological history of the Order since its promulgation on May 2, 1941, together with the text of the Order in its various stages, is set forth in Appendix B to this brief for the convenience of the Court. As there indicated, the Order has never been effective as to existing contracts and has been wholly suspended since November 12, 1941, either by action of the Commission or by court order.

The Order, as originally promulgated and as amended, deals with substantially every important business aspect of network broadcasting and promulgates eight regulations which the Commission seeks to make determinative of all future proceedings for the issuance or renewal of standard broadcast station licenses.

Two of the regulations, 3.106 and 3.107, seek to effect the forced disposition of certain stations licensed directly to NBC and other network organizations (regulation 3.106) and the forced disposition by NBC of either its "Red" or "Blue" network (regulation 3.107).* These two regulations assert a jurisdiction to compel divestiture equalled only by the power delegated to the Securities and Exchange Commission by the Public Utility Holding Company Act of 1935.

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* There are four national network organizations: National Broadcasting Company, Inc., Blue Network Company, Inc. (both companies being wholly-owned subsidiaries of Radio Corporation of America), Columbia Broadcasting System, Inc., and Mutual Broadcasting System, Inc. Blue Network Company, Inc., was organized after the commencement of this suit to operate the "Blue Network" formerly operated by National Broadcasting Company, Inc. (R. 365). In addition there are numerous regional networks. A regional network is a network which covers only a part of the country.

The Communications Act of 1934 gives the Commission no jurisdiction whatever over network organizations. The stations owned by network organizations are licensed by the Commission but the network organizations themselves are not.

As was pointed out on the previous appeal in this case, part of regulation 3.106 can also be reviewed in a licensing proceeding. The rest of regulation 3.106 is tied in with regulation 3.107 which has been suspended indefinitely subject to being made effective on not less than six months' notice, and is therefore not reviewable here. Appellants' complaint is, consequently, primarily directed to the remaining six regulations, which purported to become effective on November 15, 1941. Both regulation 3.106 and regulation 3.107, however, serve to demonstrate the extent of the jurisdiction sought to be asserted by the Commission.

The remaining six regulations, 3.101-3.105 and 3.108, are directed at the contracts between network organizations (such as NBC) and the licensees of approximately 600 independently owned and operated standard broadcast stations (such as the co-appellants) pursuant to which network broadcasting is conducted.

These six regulations do not deal with the contracts directly, but seek to effect a drastic revision of them by indirection. Each of the six regulations provides that no license shall be granted to a standard broadcast station having a contract with a network organization containing any of the provisions which the Order seeks to prohibit.

The most bitterly contested substantive issue in this case centers around regulation 3.104, which would prevent any licensee of a standard broadcast station from granting an option for any period of its broadcasting time to a network organization.

Two Commissioners dissented throughout on the grounds that the Commission is without power to adopt the regulations and that some of the contract provisions prohibited by the regulations are essential to network broadcasting (R. 151, 215).

**Chain or Network Broadcasting**

Radio broadcasting in other countries is operated by the government and is supported by taxation (R. 226). In this country radio broadcasting is not a governmental enterprise and is supported wholly by advertising (R. 41, 227).

Standard radio broadcasting in the United States is conducted by approximately 900 standard broadcast stations scattered throughout the nation, each of which is operated under a license from the Federal Communications Commission. Most stations maintain a continuous schedule of programs throughout the broadcasting day, which generally covers sixteen to eighteen hours (R. 227).

Programs may be commercial programs, paid for or sponsored by advertisers, or they may be what are called "sustaining" or non-sponsored programs, which are furnished by the broadcasters themselves in order to provide a continuous program service, to furnish the public with programs not adapted for commercial sponsorship, and to create good will (R. 228, 237).

Each standard broadcast station transmits, and the public receives, local programs, both commercial and sustaining. In the vast majority of localities the public has come to demand and expect programs of a quality and variety which cannot be produced with the limited talent and monetary resources available for broadcasts of local origin. Requisite talent is available only in the great talent centers of the nation, such as New York, Chicago, Hollywood and Washington. In general, only national advertisers possess the monetary resources necessary for the production of high quality commercial programs (R. 40, 229-230). In general, only nation-wide network organiza-

tions possess the monetary resources necessary for the production of a continuous schedule of high quality sustaining programs (R. 40, 229-230). Radio broadcasting has thus come to be preeminently a national medium of expression and a very substantial part of the revenue available to radio comes from national network advertisers (R. 40, 229-230).

The markets of national advertisers span the nation. Advertising experience shows that simultaneous circulation in those markets is necessary to obtain the maximum effect from a given commercial program. For that reason the ability of nation-wide network broadcasting to attract financial support from national advertisers is dependent upon its ability to cover the entire nation at the same instant (R. 229-233). It is this factor that gives to network broadcasting its unique usefulness and functions enabling it to subsist in stiff competition with a variety of other advertising media (R. 229-233).

No individual standard broadcast station can be heard over a sufficient area to effect simultaneous nation-wide circulation. Such circulation can be obtained only from the cooperation of many and far-flung separate radio stations for the conduct of network broadcasting. This is attained in the United States through a widespread system of contracts (known as "affiliation contracts") between a network organization and the licensed operators of independent standard broadcast stations (known as "affiliates") (R. 5-8, 232).

A network organization is essentially a program production and distribution agency. It is the central agency enabling a large number of individual stations operated by independent licensees to furnish a national service although it operates relatively few stations itself. For example,

the NBC network as of April 1, 1942 was composed of 128 stations, of which only 6 were owned by NBC.*

The studios of a network organization are connected with the stations owned and operated by its affiliated licensees by special telephone lines over which a particular commercial or sustaining program is distributed to the individual stations (R. 229). Because of the speed with which electricity travels, a program transmitted from a single point over these wirelines can reach all connected stations simultaneously.

As is explained below, the simultaneous broadcasting of the same program by all stations which receive it can only be ensured by contract.

**Development of the Affiliation Contract**

In 1926 NBC was incorporated as the first network organization. From its inception NBC has shouldered the major responsibility, as between NBC and the licensees of the standard broadcast stations connected with it by wirelines, for the development and continuance of network broadcasting by assuming wireline costs, by furnishing the stations on the network with a continuous schedule of high quality sustaining programs, by undertaking to sell the time of the stations on the network for nation-wide commercial programs, and by expending money in the further development of the art of radio broadcasting and network broadcasting (R. 70, 75-6, 230-231, 234-235). This has involved heavy financial commitments and expenses on the part of NBC (R. 234-235, 237).

Prior to 1935 NBC had scheduled network programs without formal written contracts with the operators of the

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* Hearings before Committee on Interstate and Foreign Commerce on H. R. 5497, 77th Cong., 2nd Sess. (1942), p. 182.

stations on the network. The continuance of its network broadcasting was seriously endangered by increasing difficulties, occasioned by the development and growing popularity of radio broadcasting, both local and national, in obtaining assurance that such programs would be broadcast by the stations at the time contracted for by the advertisers. After intensive study of the problem NBC, in 1935, entered into written affiliation contracts. The terms of the NBC affiliation contracts are described in the complaint (R. 7) and a form of contract is annexed to the complaint as Exhibit A (R. 18).

The typical affiliation contract provides that NBC will furnish the individual station licensee with a full schedule of sustaining programs and pay the cost of the special telephone lines, and that the proceeds from the sale of network time to advertisers will be apportioned between NBC and the station licensee. The individual station licensee, on the other hand, grants to NBC an option to sell certain specified periods of time, totaling 8½ out of 16 to 18 hours per day, except west of Denver where differences in time require that the option cover the broadcasting day. The option must be exercised by NBC at least 28 days before the program is to be broadcast. This clause, known as the option time clause, alone makes it possible for NBC to guarantee simultaneous nation-wide network circulation.*

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* The traditional exclusive arrangements between network organizations and licensees of the independent stations on the network were reflected in some of the NBC affiliation contracts. Those arrangements were based upon the need to protect the heavy expenses of network services, which increase the good will of the stations receiving them, contribute to the stations' circulation, and make the stations more valuable to both local and national advertisers. NBC found such arrangements no longer essential to its network broadcasting

Appellants regard option time as vital to the continuance of nation-wide network broadcasting. Unless national advertisers have the assurance of requisite circulation which option time alone enables NBC to give them, it would not only be impossible to schedule nation-wide commercial programs but the economic support of the sustaining and public service programs furnished by NBC would disappear.

Each affiliated licensee is separately engaged in scheduling its daily complement of local programs. NBC is at the same time engaged in scheduling a daily series of network programs to be broadcast by the stations of the affiliated licensees, which in some cases number a hundred or more. In the absence of some provision enabling the network to arrange for guaranteed periods of time on the connected stations, it is inevitable that conflicts in time commitments between the network schedule and the schedule of one or more stations will arise (R. 235-236).

The network must, however, be able to assure the national advertisers of simultaneous national circulation. This is necessary to attract an advertiser to radio in the first instance and also to induce him to embark upon a particular advertising campaign. Without the continuing certainty that simultaneous nation-wide circulation will be available when wanted, neither network nor advertiser could afford to enter into commitments for the expensive

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and discontinued them, the last of such provisions being deleted in 1941 (R. 362). Columbia Broadcasting System, Inc. and a number of regional networks, on the other hand, still find them essential to their operations (R. 73, 65).

The fact that option time clauses were adopted at a time when network broadcasting was conducted upon an exclusive basis, however, should effectively negative the contention that option time was adopted as a competitive measure against other network organizations.

and varied talent necessary to produce network programs (R. 235-236).

The failure of a single station located in a market indispensable to an advertiser or of a sufficient number of less important stations to broadcast a particular program, or uncertainty whether such stations would broadcast the program when offered, would cause the advertiser to withdraw and would defeat the desire of all of the other affiliated station licensees to carry the program (R. 235-236). This in turn would not only deprive the public of a nation-wide network broadcast but it would also deprive the network organization of the economic support necessary to its other services.*

On the other hand, it should be noted that the NBC option time provision does not cover the whole broadcast day (except west of Denver where time differences require that the option cover the broadcasting day) but instead divides the day into time subject to network option and time wholly free for local programs. In addition, each station is free to schedule programs in the time covered by the option, subject only to the exercise of the option on 28 days' notice. The NBC option time provision thus goes

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* The matter is not one of mere rapid communication between networks and affiliates, as the Government has urged. It is the continuing certainty that nation-wide circulation will be available when wanted that is essential.

The Government points to the fact that NBC communicates with its affiliates before signing a contract with an advertiser and that the contract with the advertiser provides for the *pro rata* reduction in total charges if one or more stations refuse or are unable to carry the network program. This is done in case a station does not approve of the content of the advertiser's program and in case a station has already scheduled a program it deems of greater public service than the commercial program and which cannot be moved. Although refusals for these reasons may deprive the public of a nation-wide network broadcast, such refusals are very infrequent.

only as far as the exigencies of nation-wide network broadcasting require, leaving the stations free to serve their local communities with local programs as well as with network programs.

Blue Network Company, Inc., which operates the "Blue Network" formerly operated by NBC, has affiliation contracts including option time provisions substantially similar to those of NBC.

Columbia Broadcasting System, Inc. (hereinafter called CBS) was organized in 1927 and is the second nation-wide network organization. Originally CBS made firm contracts with the licensees of each station on its network, agreeing to purchase ten specified hours of the station's time per week at the rate of $500 per week per station (R. 72). These contracts caused CBS to suffer heavy losses through its inability to sell sufficient time, and they were replaced in December, 1927, by contracts whereunder CBS received options on certain of the time of the stations of its affiliated licensees. Currently the CBS contracts grant an option to CBS upon fifty so-called converted hours per week (R. 73).

In 1934 Mutual Broadcasting System, Inc. (hereinafter called MBS) was formed by The Tribune Company (which publishes The Chicago Tribune and owns station WGN in Chicago), and R. H. Macy & Co., Inc., the owner of station WOR in New York (R. 62). Starting with a network of four stations MBS attained the status of a nation-wide network in 1936 (R. 63).

Because MBS has taken a position in support of the Order, and because the District Court has attached significance to that fact, it is necessary to point out the differences between nation-wide network broadcasting as conducted by

MBS and nation-wide network broadcasting as conducted by the other national network organizations.

On June 1, 1942 MBS was owned by eight stockholders. The Chicago Tribune, R. H. Macy & Co., and Don Lee Broadcasting System (the licensee of four stations and the operator of a regional network on the Pacific Coast) each owned approximately one quarter of the outstanding shares. The remainder was owned in equal amounts by Yankee Network, Inc., the licensee of four stations and the operator of a regional network in New England; United Broadcasting Company, the licensee of three stations in Ohio; the Cincinnati Times Star Co., the licensee of a station in Cincinnati; Buffalo Broadcasting Corporation, licensee of a station in Buffalo; and Western Ontario Broadcasting Co., Ltd., the owner of a station in Windsor, Canada.* Since that date several additional stockholders have been added.

MBS conducts nation-wide network broadcasting without assuming the responsibilities and liabilities of a network organization such as NBC and CBS. Although MBS does arrange for the sale of network time to advertisers, it has not, with rare exceptions, assumed wireline costs, nor has it assumed the obligation of furnishing a continuous schedule of sustaining programs to the station licensees affiliated with it (R. 62-64, 76, 79). Most of the MBS sustaining programs are furnished by WGN and WOR, behind which stand The Chicago Tribune and R. H. Macy & Co., whose assets far exceed those of NBC or CBS and are not dependent upon the fortunes of network broadcasting. As a network organization, MBS is little more than a switchboard for the routing of the programs of its stockholders

* Hearings before Committee on Interstate and Foreign Commerce on H. R. 5497, 77th Cong., 2nd Sess. (1942).

and affiliates and network programs to the stations on the MBS network.

In addition, the powerful stations and regional networks which are stockholders of MBS are sufficient to form a sizable nation-wide network by themselves. Being stockholders and as such having a direct financial interest in the prosperity of MBS, the component parts of MBS are very unlikely to refuse to take MBS programs because of time conflicts or for any other reason. Contracts granting an option on the time of the stations are very much less necessary if the stations are also stockholders. This is not the case with NBC or CBS but it is with MBS. Nevertheless MBS adopted option time in 1940. The regional networks comprising MBS, as well as other regional networks, have found options on the time of the stations of their affiliates essential to their operation.

Affiliation contracts containing provisions for the optioning of time of independent standard broadcast stations, i.e. of stations neither controlled by nor financially interested in the network, are the essence of network broadcasting as presently conducted. The NBC contracts represent a careful and delicate balance between the autonomy of the independent local station licensee in rendering both a local and a national service and the dependence of the national service upon simultaneous nation-wide circulation.

**Network Program Service**

For less than $10 and at the push of a button the humblest citizen of the United States has at his command, day in and day out, the best cultural, educational, informative and entertaining programs the nation affords, and a continuous service of news, news commentaries and public

discussion. The horizon of every home in which there is a radio set has been incalculably broadened by the achievement of network broadcasting in producing and distributing programs of a quality and variety that cannot be obtained from local sources. This in turn has been made possible only through the achievement of network broadcasting in tapping the resources of national advertisers.

It is a fundamental misconception to assume that the network organizations are in possession of a continuous supply of programs which they can distribute to the nation at will. The truth of the matter is that there is a continuous supply of programs only because of the system of contracts developed between individual station licensees and the network organizations enabling them to respond to the needs of a national radio service. Without this system, of which option time is the keystone, radio would not be able to convert the money which national advertisers have to spend into the program service received by the American people today, which is admittedly the finest in the entire world.

The network organization is not like a manufacturer of a product who can make the product and then as a separate transaction distribute it in the manner which suits him best. Network broadcasting is wholly dependent upon the system of contracts outlined above to obtain its product, namely, programs. Unless the requisite national circulation can be guaranteed to the national advertiser he will not use network broadcasting as an advertising medium. He will not make available his program and the network organization will not obtain the money to spend on sustaining programs.

Although only one-third of the total radio broadcasting time in America is paid for directly by advertisers, this

one-third supports the wide variety of public service and sustaining programs covering the remaining two-thirds of the broadcast day. Critics of the daytime serials must be reminded that commercial programs include the Metropolitan Opera and other outstanding programs of classical music, entertainment programs of the finest quality, news broadcasts and news analyses by the highest ranking experts.

They must also be reminded that without the commercial programs the many and varied sustaining programs would not exist—programs such as the NBC Symphony Orchestra under the direction of Arturo Toscanini, the National Radio Forum, the University of Chicago Round Table Discussion, America's Town Meeting of the Air (R. 237), round-ups of world news transmitted by short wave from special correspondents stationed in virtually every important city in the world and throughout the war zones, and the various news broadcasts scheduled by NBC in addition to those which are sponsored (R. 405-410). Before the participation of the United States in the war NBC maintained its own news correspondents in twenty-six foreign countries, including the cities of London, Singapore, Shanghai, Chungking, Vichy, Berlin, Rome, Tokio, Stockholm, Berne, Cairo, Helsinki, Ankara and Buenos Aires (R. 407). Such correspondents are still maintained in neutral and allied countries.

The press also has its advertisers, and its comic strips and serial stories which build and hold circulation and thus attract advertisers. These are the economic foundation of a free press. Commercial programs are the economic foundation of a free radio.

**Regulation 3.104**

It is apparent that the regulation of critical importance to appellants in this suit is regulation 3.104, prohibiting any licensee of a standard broadcast station from granting an option for any period of its broadcasting time to a network organization. As promulgated on May 2, 1941, regulation 3.104 was a flat prohibition against such an option. The regulation was premised upon the hypothesis that because available standard broadcast stations are limited, and since all users of radio time cannot at once have an option upon the same period of time of a station in a locality where stations are few, the preservation of competition requires that no one have such an option.

Forbidding the station licensees to grant options to any one would be the death knell of the present system of nation-wide network broadcasting. As stated by the dissenting Commissioners, Craven and Case:

> "It is axiomatic that unlimited availability of the few existing radio facilities and efficient national program distribution cannot both be attained at the same time." (R. 152)
>
> "* * * the Commission need not and should not promulgate rules the effect of which would destroy all existing systems, merely to provide some other private enterprise with an opportunity to capture the revenues of broadcasting." (R. 154)

After the promulgation of the Order on May 2, 1941, the industry pressed upon the Commission the practical exigencies of network broadcasting in a series of conferences. On September 12, 1941, the Commission held a re-

hearing upon the petition of MBS which requested that regulation 3.104 be amended so as to permit options upon certain periods of station time, based upon prior use.

On October 11, 1941, the Commission amended its Order, including regulation 3.104. As amended, regulation 3.104 continued to prohibit a true option on any part of a station's time and invented something the Commission called a "non-exclusive option", exercisable on not less than 56 days' notice.

It is of the essence of an option that it be good against the world, but the so-called non-exclusive option is not good against any other network organization, whether regional or national. The 56-day period of time flagrantly disregards the practical necessities of the advertising business and would seriously disable network organizations in competing with other advertising media. The amendment is intricate and confusing, but it is equally a death blow to nation-wide network broadcasting. The impractical nature of the amended regulation was recognized by Commissioners Craven and Case, who said:

> "* * * Apparently by changing the regulation originally promulgated, the majority intended to recognize the practical business situation in broadcasting. It is our opinion that the new regulation does not accomplish this purpose and that networks in reality secure no substantial option privileges under this regulation. We believe that stations should be permitted to utilize the same option principles as is done in ordinary business." (R. 217)

The sole justification of the majority of the Commission for its refusal to recognize the impossibility of conducting network broadcasting without option time was its insistence

upon attributing an overriding importance to unlimited competition:

> "The Commission has rejected the proposal, suggested but not unqualifiedly recommended in the Mutual petition, to permit a station to option exclusively to one network the particular periods of time utilized by that network for network commercial programs over the station during the preceding year. An exclusive option effectively removes a station from the station-network market with respect to all the time it covers. The Commission believes that such a serious restraint upon competition is inconsistent with the freely competitive system contemplated by Congress in the Communications Act of 1934." (R. 210)

**Power Asserted by the Commission**

Regulation 3.104 is only one of eight regulations promulgated by the Order. It strikes at the heart of network broadcasting; the remaining regulations blanket the entire field.

The bases upon which the Commission purports to obtain support for the powers assumed by the Order are disclosed by the statements made at various times by the Commission majority and its Chairman. For example, at pages 46 to 47 of its Report the Commission majority appears to base the Order upon the applicability of the anti-trust laws to radio broadcasting:

> "The prohibitions of the Sherman Act apply to broadcasting. This Commission, although not charged with the duty of enforcing that law, should administer its regulatory powers with respect to broadcasting in the light of the purposes which the Sherman Act was designed to achieve. In the ab-

sence of Congressional action exempting the industry from the anti-trust laws, we are not at liberty to condone practices which tend to monopoly and contractual restrictions destructive of freedom of trade and competitive opportunity. *Had we liberty in this regard we should require a very clear showing that such practices or restraints, because of conditions peculiar to the industry, promote the best interests of the listening public.* In any event, preservation of the fullest possible measure of competitive opportunity consistent with furnishing the public adequate broadcasting service is one of the elements to be considered in applying the statutory standard of 'public interest, convenience, or necessity.' "* (R. 82-83)

Further, in characterizing the Order before the Senate Committee on Interstate Commerce, the Chairman of the Commission described it thus:

"Mr. Fly: It is no more a regulation of the freedom of business than a decree of a court. No one has ever asserted, for example, that a decree of a court, breaking down certain restraints of trade, is in itself a regulation of the business. *Yet this is the very sort of decree that a court charged with the duty of interpreting the anti-trust laws by way of equity injunction, would write.*" (Hearings before Senate Committee on Interstate Commerce on S. Res. 113, 77th Cong., 1st Sess. (1941), p. 68.)

However, when pressed with the contention that the applicability of the anti-trust laws to radio broadcasting was a matter which concerned the Anti-Trust Division of

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* All italics in quotations in this brief are supplied unless otherwise noted.

the Department of Justice and the courts and not the Commission, the majority argued that its jurisdiction to promulgate the Order did not depend upon the applicability of the anti-trust laws to radio broadcasting, explaining at page 83 of the Report:

> "While many of the network practices raise serious questions under the antitrust laws, our jurisdiction does not depend on a showing that they do in fact constitute a violation of the antitrust laws. It is not our function to apply the antitrust laws as such. It is our duty, however, to refuse licenses or renewals to any person who engages or proposes to engage in practices which will prevent either himself or other licensees or both from making *the fullest use of radio facilities. This is the standard of public interest, convenience or necessity which we must apply to all applications for licenses and renewals.*" (R. 119)

This was further developed in a footnote on page 83 of the Report, as follows:

> "It is not entirely clear just what point the networks seek to make. If the argument they advance is that we cannot deny a license to an applicant on the ground that his practices violate the antitrust laws unless a Federal court has first found the applicant guilty, then they misinterpret our decision. We do not predicate our jurisdiction to issue the regulations on the ground that the network practices violate the antitrust laws. We are issuing these regulations because we have found that the network practices prevent *the maximum utilization of radio facilities in the public interest.*" (R. 119)

The general purport of these and other utterances of the Commission is that the Commission asserts the power

broadly to regulate business practices in network broadcasting according to its own competitive philosophy whether or not such practices violate the anti-trust laws. The Commission majority has plainly stated that it is only necessary for it to find that those practices are contrary to its interpretation of "public interest, convenience or necessity."

The Order is not the result of a licensing proceeding but developed from the industry-wide investigation of all aspects of network broadcasting instituted by the Commission under its Order No. 37, promulgated on March 18, 1938. Neither the investigation nor the Report on Chain Broadcasting nor the Order concerns itself with the particular situation of individual standard broadcast stations. Although the regulations are cast in terms of restrictions upon the issuance of licenses, only regulation 3.106, dealing with the licensing of stations to network organizations, can fairly be said to be concerned with the licensing function. The remaining regulations seek to use the licensing power as a means of enforcing a jurisdiction not contemplated by the statute and the result of the Order is a comprehensive attempt on the part of the Commission to regulate the business enterprise of network broadcasting as a whole.

The issues here raised with respect to the power of the Commission to promulgate the Order and with respect to the arbitrary and capricious nature of the Order have nothing to do with the technical competence of the Commission in passing upon individual license applications and renewals in which power, frequencies and interference between stations are the primary considerations. The Order represents a frolic and detour, as it were, into the field of business practices, competition, and the meaning of the anti-trust laws. This appeal presents the question whether

the Communications Act of 1934 empowers the Commission not only to enter but to blanket this field.

**The Anti-Trust Suits in Chicago**

It must also be pointed out at the outset that there can be no contention here that the matters complained of by the Commission will remain beyond the reach of governmental correction, if correction is needed.

Soon after this action was brought the Anti-Trust Division of the Department of Justice filed suits in equity in the Federal District Court in Chicago against NBC and CBS with respect to the very same matters which are made the basis for the present Order of the Commission, as will be apparent to the Court from a reading of the complaint in the NBC suit, appearing as Appendix C to this brief. These cases are pending. They are now at issue and have been set for trial on April 12, 1943.

## Specification of Errors

The District Court erred:

1. In dismissing appellants' complaint on the merits.

2. In failing to issue the injunction prayed for by appellants.

3. In placing a construction upon the Communications Act of 1934 repugnant to Section 326 of said Act, to the First Amendment to the Constitution of the United States and to Article I, Section 1, of the Constitution of the United States, in order to support the Order sought to be set aside in this suit.

4. In holding that the Federal Communications Commission has the power to promulgate the Order, and in failing to hold, as it should have done, that the Federal Communications Commission has no power to promulgate the Order.

5. In failing to hold that the Order bears no reasonable relation to the standards and objectives of the Communications Act of 1934 and is arbitrary and capricious.

6. In dismissing the complaint without holding a trial to determine the reasonableness of the relation of the Order to the standards and objectives of the Communications Act of 1934.

7. In holding that the Order is not so plainly without support in the evidence taken before the Commission as to be arbitrary and capricious.

## Summary of Argument

The Communications Act of 1934 provides for the direct licensing of instruments of free speech and Section 326 of the Act reads the First Amendment to the Constitution into the Act. The licensing of instruments of free speech is supportable only in so far as it is necessary to protect clearly defined interests more important than freedom of speech itself.

The provisions of the Communications Act of 1934 dealing with radio broadcasting are virtually a reenactment of the Radio Act of 1927 and are premised upon the need to regulate the physical and technical aspects of radio in

order to prevent the chaotic electrical interference between stations which had developed under the Radio Act of 1912. Neither Act contains any authorization to the Commission to regulate the contractual relationships between licensees of standard broadcast stations and network organizations in any manner whatsoever.

The Commission and the District Court have construed the Communications Act of 1934 as empowering the Commission to regulate these contractual relationships pursuant to the "public interest, convenience or necessity", "larger and more effective use of radio in the public interest," and "equitable radio service to the listeners." The language thus relied upon in support of the Order by the Commission and the District Court does not possess an independent content but can derive meaning only from other and more specific provisions of the Act. A construction of the Act which would give independent content sufficient to support the Order to such vague and general provisions would be repugnant to the First Amendment as well as to Article I, Section 1, of the Constitution of the United States.

The Order is also sought to be supported upon an assumed power on the part of the Commission to regulate business practices in network broadcasting pursuant to its conception of the principles and policies of the anti-trust laws. The clear command of the Act is that the Federal Communications Commission is not to concern itself with the anti-trust laws.

Section 303(i) of the Act empowering the Commission to make special regulations applicable to radio stations engaged in chain broadcasting does not support the juris-

diction asserted. The bare language of this subdivision can also have no meaning separate and apart from its context which relates solely to the physical and technical aspects of chain broadcasting.

The Order would deny licenses to all radio stations having the proscribed contractual relationships without regard to the varying facts of specific licensees and applicants for standard broadcast station licenses. The Commission cannot evade its statutory duty to evaluate and decide each license application on its own facts by promulgating the blanket predeterminations of all cases contained in the Order. It cannot be contended that each contractual provision prohibited by the Order is alone ground for the denial of each and every particular license application.

The extreme power assumed by the Commission and the destructive impact of the Order upon nation-wide network broadcasting and the radio services supported thereby clearly demonstrate that the Order is arbitrary and capricious, and is wholly unrelated to the standards, purposes and objectives of the Communications Act of 1934.

The District Court disposed of the case as upon a quasi-judicial record made before the Commission covering the issues raised in this suit. Such is not the fact. The record made before the Commission was a formless investigation covering many aspects of nation-wide broadcasting not included in the Order and to which the substantial evidence rule cannot be applied. Appellants are entitled to a trial in the District Court on the question whether the Order bears a reasonable relation to the standards and objectives of the Communications Act of 1934.

# ARGUMENT

## POINT I

**The Construction of the Communications Act of 1934 Advanced by the Commission and Adopted by the District Court in Support of the Order is Repugnant to the First Amendment and to Article I, Section 1, of the Constitution.**

The most significant single fact about the Communications Act of 1934 and its predecessor the Radio Act of 1927 is that they provide for the direct licensing of instruments of free speech. The Federal Communications Commission holds the power of absolute life or death over every radio station in the United States, each of which is an independent instrument or vehicle of free speech. The basic issue in this case is the scope of the standard pursuant to which the Commission is to exercise this power.

The development of radio has restored communication by speech to the position it had before the invention of the printing press as the most important method of human expression. Although in other countries radio is a government monopoly, supported by taxation, radio broadcasting in the United States is a free enterprise and regulated as such, with the result that our radio service is unequalled throughout the world.

A free radio has become at least as important a part of our heritage as a free press. From its beginnings as a gadget with which only a few people could afford to play in the early 1920's through an intermediate stage when it was regarded primarily as a source of entertainment to a

wider circle of homes, radio has developed into the most important single vehicle for the dissemination of opinion, information, education and entertainment, reaching many more people than the press, including books, magazines and newspapers.

Independent studies show that radio is relied upon for information by far more people than the press. The importance of radio is attested to by the appointment of Elmer Davis, a radio news analyst who for many years had been sponsored by an advertiser on the CBS network, to the chairmanship of the Office of War Information.

The provision of the First Amendment to the Constitution that "Congress shall make no law • • • abridging the freedom of speech or of the press" was embodied by Congress in Section 326 of the Communications Act of 1934 (Section 29 of the Radio Act of 1927) by providing that:

> "Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication. • • •"

In view of the clear recognition by Congress that the hard-won concepts of freedom of speech and freedom of the press are fully applicable to radio, it cannot be assumed that Congress has legislated with respect to radio without a deep-seated sense of the danger of attempting to regulate radio broadcasting at all. The Communications Act of 1934 must be construed in this light.

It is axiomatic that only clearly defined interests, the protection of which is of greater importance than the pro-

tection of free speech, will support the threat to the freedom of speech inherent in the licensing of the instruments or vehicles of speech.

"The struggle for the freedom of the press was primarily directed against the power of the licensor. It was against that power that John Milton directed his assault by his 'Appeal for the Liberty of Unlicensed Printing.' And the liberty of the press became initially a right to publish '*without* a license what formerly could be published only *with* one.' (See Wickwar, 'The Struggle for the Freedom of the Press,' p. 15.) While this freedom from previous restraint upon publication cannot be regarded as exhausting the guaranty of liberty, the prevention of that restraint was a leading purpose in the adoption of the constitutional provision." Hughes, C. J., speaking for a unanimous court in *Lovell* v. *Griffin*, 303 U. S. 444, 451 (1938). That case struck down an ordinance requiring a permit for the distribution of pamphlets against the contention that the ordinance was a police measure calculated to keep the streets, gutters and sidewalks of the city clean and was not adopted for the purpose of infringing speech.*

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* See also *Schneider* v. *State (Town of Irvington)*, 308 U. S. 147 (1939); *Hague* v. *Committee for Industrial Organization*, 307 U. S. 496 (1939).

The cases also establish the proposition that even though the interest which the legislature seeks to protect is of sufficient importance to justify a limitation upon the rights of free speech the necessity must be clear. Not only must there be a reasonable relation between unrestricted exercise of the right of free speech and damage to the protected interest, but also a "clear and present danger" of such injury under all applicable circumstances must be affirmatively shown. See *Bridges* v. *California*, 314 U. S. 252 (1941); *Schenck* v. *United States*, 249 U. S. 47 (1919); *Whitney* v. *California*, 274 U. S. 357 (1927); *De Jonge* v. *Oregon*, 299 U. S. 353 (1937); *Schaefer* v. *United States*, 251 U. S. 466 (1920); *Pierce* v. *United States*, 252 U. S. 239 (1920).

The interest sufficient to support the licensing of radio broadcasting in a manner compatible with the First Amendment lies in the sheer physical necessity of preventing destructive electrical interference between stations.

**Federal Regulation of Radio**

Radio broadcasting is the transmission of electrical energy from a station using a specific frequency to receivers attuned to the same frequency without the aid of physical connection by wire. Two stations cannot be intelligibly received by a radio set within range of both if they broadcast simultaneously upon the same frequency. This problem in radio is known as the problem of interference.

The earliest statute regulating radio was the Radio Act of 1912, which was enacted at a time when radio was primarily used for telegraphic communication and provided for the Federal licensing of transmitters by the Secretary of Commerce. The development of radio broadcasting and the multiplication of radio stations made that Act obsolete, for under it the Secretary of Commerce was bound to grant a license to any applicant and licensees were not required to confine themselves to their allotted frequencies. The result was chaotic interference between stations which threatened utterly to destroy the usefulness of radio. More comprehensive regulation was imperative if radio was to survive.

The Radio Act of 1927 was enacted to meet this need; the powers of the Federal Radio Commission under that Act were transferred to the Federal Communications Commission in 1934. Title III of the Communications Act of 1934, which deals with radio broadcasting, reenacted

without substantial change the provisions of the Radio Act of 1927.

As stated by the District Court, the Commission's powers under Title III of the Communications Act of 1934 are largely set forth in Section 303 (Section 4 of the Radio Act of 1927). Under Section 303 the Federal Communications Commission is vested with comprehensive authority to regulate the physical aspects of the use of the radio spectrum which it is to exercise according to the public interest, convenience or necessity. In addition, the operation of a radio station without a license from the Commission is made illegal by Section 301 and the Commission is required by Sections 307(a) and 309(a) to license applicants for radio facilities upon a finding of public interest, convenience or necessity. Section 307(b) of the Act (Section 9 of the Radio Act of 1927) states that the Commission shall distribute licenses, frequencies, time and power among the different states and communities so as to give fair, efficient and equitable radio service to each.

The Commission's powers with respect to radio broadcasting are thus primarily directed toward the orderly use and allocation of available radio facilities and the orderly development of those parts of the radio spectrum not fully utilized or not yet developed at all. For example, Section 303(g) of the Act provides that the Commission shall "study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest."

Such phrases as "generally encourage the larger and more effective use of radio in the public interest" have purpose and meaning when taken together with their context and the purpose of Congress in creating a Commission to

regulate and license the use of radio facilities. The same is true of the phrase "provide a fair, efficient and equitable distribution of radio service" as used in Section 307(b) with respect to the geographical distribution of licenses, frequencies, hours of operation and power. The same considerations also apply to the guiding statutory standard of "public interest, convenience or necessity."

All this general phraseology either acquires from the manner and place in which it is used meaning sufficient to serve for the guidance of an administrative tribunal, or it lacks such meaning altogether. If the requirements of Article I, Section 1, of the Constitution of the United States are to continue to be observed, and the guaranties of the First Amendment are to continue to be applicable to radio broadcasting, the radio sections of the Communications Act of 1934 must be construed in accordance with the purposes of the Congress in creating this licensing authority, and the general language of the statute must be strictly limited in accordance with its context*.

**Statutory Language Relied Upon by the Commission and the District Court is Insufficient to Support the Order**

The Communications Act of 1934 contains no provision of any sort giving the Federal Communications Commission jurisdiction over business practices in network broad-

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* *Federal Radio Commission* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U. S. 266, 285 (1933); *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 428 (1935); *Schechter Poultry Corp.* v. *U. S.*, 295 U. S. 495, 540 (1935); *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U. S. 470, 473 (1940). Compare *N. Y. Central Securities Co.* v. *U. S.*, 287 U. S. 12, 24 (1932). See especially Caldwell, *Freedom of Speech and Radio Broadcasting*, **The Annals of the American Academy of Political and Social Science**, January 1935, at page 194.

casting or in any other kind of broadcasting. The Commission's powers under the Act are directed toward other ends entirely.

In attempting to advance statutory support for its Order the Commission has therefore found itself compelled to disregard the specific statutory provisions actually determinative of this case; to disregard the purposes of Congress in enacting the radio sections of the Communications Act of 1934; and to rely instead upon general phrases, such as the "public interest, convenience or necessity" and the "larger and more effective use of radio in the public interest."

The District Court likewise construed the phrase "public interest, convenience or necessity" as a "standard" and a "rubric" meaningful in itself, upon which the Commission could ring the changes, and relied upon the Congressional admonition that the Commission "generally encourage the larger and more effective use of radio in the public interest." The District Court even went so far as to rely upon the earlier draft of subdivision (i) of Section 303, which would have urged the Commission to promote "equitable radio service to the listeners".*

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* Subdivision (i) of Section 303 provides that the Commission shall "have authority to make special regulations applicable to radio stations engaged in chain broadcasting." The interpretation of this subdivision which its context and purpose requires is discussed in Point II of this brief. The earlier draft relied upon by the District Court provided that the Commission should have the authority:

> "When stations are connected by wire for chain broadcasting, [to] determine the power each station shall use and the wave lengths to be used during the time stations are so connected and so operated, and make all other regulations necessary in the interest of equitable radio service to the listeners in the communities or areas affected by chain broadcasting."

The context of "equitable radio service to the listeners" as used in the subdivision clearly refers to technical matters.

To place reliance upon the phrase "public interest, convenience or necessity", the phrase "larger and more effective use of radio in the public interest", and the phrase "equitable radio service to the listeners", as substantive grants of power to the Federal Communications Commission is to fly in the face of the First Amendment and Article I, Section 1, of the Constitution of the United States. Whatever encouragement these phrases may give the Commission in the performance of its clearly defined functions under Title III of the Act, it is a travesty upon statutory construction to take them as meaningful in themselves.

Similar phraseology in statutes regulating public utilities means that the industry is to be regulated as a monopoly. Here the phraseology is advanced in support of an Order designed to increase competition. The point need not be labored. The guaranties of the First Amendment would be weak indeed if the licensing of this important instrumentality of free speech according to such indefinite and subjective standards were supportable.

In *Stromberg* v. *California*, 283 U. S. 359 (1931), a statute forbidding the displaying of a red flag "as a sign, symbol or emblem of opposition to organized government" was held invalid by the Court as an infringement of the right of free speech because the standard was construed to be ambiguous and indefinite. The Court stated:

> "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system. A

statute which upon its face, and as authoritatively construed, is so vague and indefinite as to permit the punishment of the fair use of this opportunity is repugnant to the guaranty of liberty contained in the Fourteenth Amendment. The first clause of the statute being invalid upon its face, the conviction of the appellant, which so far as the record discloses may have rested upon that clause exclusively, must be set aside." (pp. 369-370)

See also

*Bridges* v. *California*, 314 U. S. 252, 260 (1941);
*Schneider* v. *State (Town of Irvington)*, 308 U. S. 147, 163 (1939);
*Near* v. *Minnesota*, 283 U. S. 697, 712 (1931).

A simple illustration will demonstrate the fallacy and the danger of construing general language such as that relied upon by the Commission and the District Court as operative apart from its context and unlimited by the purposes of the Act.

Let us assume that the current shortage of wood pulp has severely increased and has resulted in a continuing limitation upon the available supply of newsprint. There is not enough to supply existing newspapers with the amount they have previously used or to enable additional newspapers to be published at will. The future of the press will be in danger unless the available supply of newsprint is allocated in an orderly manner.

Congress, therefore, enacts a statute setting up the Newsprint Allocation Board which is authorized to license the use of newsprint to newspapers according to the public interest, convenience or necessity. The Board is also enjoined, of course, generally to encourage the more effective

use of newsprint in the public interest as well as equitable service to readers. Let us further assume that this Board licenses newspapers throughout the land to use newsprint, pursuant to the public interest, convenience or necessity and having regard to the equitable distribution of newsprint and the amount and quality of available newsprint.

The Board then promulgates an order to the effect that no newspaper shall be licensed to use newsprint if it continues to have a contract with the United Press or with Syndicated Features, Inc. pursuant to which the newspaper receives its national news and its syndicated articles of opinion.

The Board also issues a report urging that the contracts of newspapers with the United Press and Syndicated Features, Inc. violate the principles and policies of the anti-trust laws and are contrary to the public interest. The report states that the more effective use of newsprint and equitable distribution of newsprint to readers means that such contracts must be abrogated.

The departure from the objectives of Congress in creating such a Board, which alone justified any regulation of the press at all, and the direct and unrestricted jurisdiction asserted over the freedom of the press inherent in the claim to regulate the press pursuant to the Board's notions of public interest, convenience or necessity and more effective use of newsprint would be clearly invalid.

This is doubly true because the remedy to correct the alleged contractual abuses lies in the independent enforcement of the anti-trust laws by the Department of Justice and not in expanding the power of the licensor of instruments of free speech. Only by circumscribing the power

of the licensor with the strictness required by the guaranties of the First Amendment can the freedom of the press be preserved. This is not to say, be it noted, that the press is exempt from the application of the principles embodied in the supposed order of the Newsprint Allocation Board. There remains the entirely adequate machinery for the enforcement of the anti-trust laws.

Radio is no less entitled to the protection of the guaranties of the First Amendment than is the press. Freedom of the press has become traditional, but it was established and has been maintained only through a vigilance commensurate with its value to a free people. Congress has stated in Section 326 of the Communications Act of 1934 that this tradition is fully applicable to radio. Ours is the first generation to fight the perennial battle of freedom on this new front. Unless the same vigilance is applied to freedom of radio as former generations applied to freedom of the press, one of our most sacred rights will be lost.

**The Claim of Power to Protect Free Speech**

The District Court addressed itself to appellants' argument that the power asserted by the Commission is incompatible with the guaranties of the First Amendment as though the argument were that the Order itself was an infringement of freedom of speech, stating:

> "We agree that the regulations might be invalid though they do not prohibit programs on the basis of their contents; *they do fetter the choice of the stations; absolutely free choice would include the privilege of deciding that they preferred the opportunities open to them under the 'networks' contracts to those*

> *which would be otherwise available. The Commission does therefore coerce their choice and their freedom; and perhaps, if the public interest in whose name this was done were other than the interest in free speech itself, we should have a problem under the First Amendment;* we might have to say whether the interest protected, however vital, could stand against constitutional right. But that is not the case. The interests which the regulations seek to protect are the very interests which the First Amendment itself protects, i. e., the interests, first, of the 'listeners,' next, of any licensees who may prefer to be freer of the 'networks' than they are, and last, of any future competing 'networks.' Whether or not the conflict between these interests and those of the 'networks' and their 'affiliates' has been properly composed, no question of free speech can arise." (R. 529)

The District Court thus not only accepted the vague and undefined nature of the power asserted by the Commission but went on to admit that the Commission directly coerced freedom of speech over the radio. Instead of drawing the only conclusion compatible with the command of the First Amendment—that such a power does not exist—the District Court upheld the power because the Commission proclaimed that it acted in the name of free speech.

It is correct that the Commission in asserting a power fraught with danger to and, in fact, incompatible with freedom of speech, has proclaimed its intention to preserve that basic freedom. Thus we find, in the Commission's Supplemental Report the following statement:

> "The Commission adheres to the views expressed in its Report on Chain Broadcasting. It is of the opinion that the chain broadcasting regulations will

> tend to decentralize the tremendous power over what the public may hear which is now lodged in the major network organizations * * *." (R. 212).*

It is well settled, however, that the First Amendment forbids governmental interference asserted in aid of free speech as well as governmental action repressive thereof.

This fundamental principle is illustrated by *Powe* v. *United States*, 109 F. (2d) 147 (C. C. A. 5th 1940), cert. denied 309 U. S. 679 (1940). In that case defendants were indicted under Section 19 of the Federal Criminal Code (18 U. S. C. A. § 51), which provides in part:

> "If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same * * * they shall be fined not more than $5,000 and imprisoned not more than ten years, and shall, moreover, be thereafter ineligible to any office, or place of honor, profit, or trust created by the Constitution or laws of the United States."

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* Compare, however, the following, to be found at page 100 of the report to the Commission by the Committee which heard evidence in FCC Docket No. 5060:

> "The Columbia and National networks, which together produced 75,000 sustaining programs in 1938 and, in addition, distributed approximately 50,000 commercial programs produced for them by others to whom they delegated the duty, have operated throughout their existence without any well-defined and comprehensive program policies. Temporary and isolated decisions have been made from time to time by the management of the networks resulting in pronouncements upon social, moral and political policies which sought to follow current thought. At no time during the history of these networks have they defined or indicated a clear path along which their program efforts should move, nor have they done anything other than to establish boundaries within which the networks hoped to operate."

Defendants were charged under that statute with threatening the executive editor of two Alabama newspapers that if he printed editorials exposing certain local lotteries, the defendants would publish an obscene photograph of the editor. The offense alleged was conspiracy to intimidate the editor in the free exercise of his right and privilege as a citizen to publish his views in the newspapers.

The Circuit Court of Appeals for the Fifth Circuit reversed defendants' conviction and remanded the case to the trial court with instruction to sustain defendants' demurrers to the indictment.

The Court based the reversal upon the ground that the First Amendment preventing interference with free speech was not a grant of power to Congress to enact legislation designed to protect it, stating at pages 150-151:

> "The provision there is 'Congress shall make no law * * * abridging the freedom of speech, or of the press.' That the first ten amendments were intended as limitations on the power of the federal government and are not grants of power to it has been established from the beginning. *A flat prohibition against the regulation of a matter in one direction cannot result in endowing Congress with power to regulate it in another direction. This amendment, while regarding freedom in religion, in speaking and printing, and in assembling and petitioning the government for redress of grievances as fundamental and precious to all, seeks only to forbid that Congress should meddle therein.* If Congress can make any law in behalf of these it is because of some power elsewhere expressly granted, or because it is a law necessary and proper to carry out such power."*

* See also *United States* v. *Cruikshank, et al.*, 92 U. S. 542 (1875); *United States* v. *Moore*, 129 Fed. 630 (Cir. Ct. N. D. Ala. S. D. 1904).

In view of the terms of Section 326, the language of the court in the *Powe* case may appropriately be paraphrased to apply to the Commission as follows:

> A flat prohibition against the regulation of a matter in one direction cannot result in endowing the Commission with power to regulate it in another direction. This provision of the statute, while regarding freedom in speaking and broadcasting as fundamental and precious to all, seeks only to forbid that the Commission should meddle therein.

Section 326 expressly provides that:

> "*Nothing in this Act* shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and *no regulation* or condition shall be promulgated or fixed by the Commission which shall *interfere* with the right of free speech by means of radio communication. • • •"

There is a real question, moreover, as to the nature of the Commission's interest in enlarging its powers and "protecting" free speech in view of the dissenting opinion of Commissioners Craven and Case, wherein it is stated, at page 124 of the Report:

> "Some criticisms of broadcasting are erroneously attributed to the fact that most of the licensees are business men. It is claimed that as such, their judgment as to social philosophies is similar. Thus, as a group they are said to reject social and economic philosophies advocated in recent years by some of our more 'advanced thinkers.' Therefore, it is claimed that the broadcasting licensees as a group are rendering to the people of the United States the character of broadcasting which tends to favor one social

philosophy as contrasted to all others and that as a result the existing broadcasting service is not useful in accomplishing desired social improvements. The indisputed facts are that radio broadcasting has been utilized as an open forum. Furthermore, under the American system, the objective has been to render to the public the radio service the public desires rather than to force upon the public the type of service which individuals think the public should have.

"Experience does not justify the conclusion that the limited number of available frequencies should be apportioned to groups of men or to separate organizations who are proponents of particular social philosophies. In fact, such a course might well destroy the general usefulness of radio. It would result in a trend toward the use of radio for a particularized purpose rather than its use in the public interest generally." (R. 160)

This evidence of the intent behind the Order together with the disastrous economic effect of the Order upon network broadcasting shows that the Order is invalid under the doctrine of *Grosjean* v. *American Press Co.*, 297 U. S. 233 (1936), as well as under the *Powe* case.

## POINT II

### The Express Provisions of the Communications Act of 1934 Preclude the Power Asserted by the Commission.

The Federal Communications Commission is by no means dependent for enough to do upon the expansively invalid construction of the Act advanced in support of the Order. The Commission has pervasively detailed regula-

tory functions under Title II of the Act with respect to common carrier communications as well as its functions under Title III with respect to radio broadcasting. Under Title III alone the proper discharge of the fundamental purpose of Congress in providing for the orderly allocation of frequencies and power in order to prevent interference between stations calls for the continuous exercise of a technically expert discretion.

Under Section 303 the Commission has the duty to classify radio stations and to prescribe the service to be rendered by each class, the duty to assign bands of frequencies to classes of stations and specific frequencies within the various bands to individual stations, to determine the power, time of operation and location of stations, to provide for experimental uses of frequencies, and a multitude of other regulatory powers vitally necessary to the development and orderly use of the whole radio spectrum.

Under its licensing powers the Commission has charge of the issuance of new standard broadcasting station licenses and the periodic review of over 900 licenses already outstanding. The Commission must also issue licenses in the ever expanding spectrum for the use of ever increasing new facilities, such as the use of short wave, television and frequency modulation. These are the forefronts of the radio art.

With respect to each license application the Commission must exercise a technically expert judgment in connection with the allocation of available facilities and in connection with all matters specified in Section 308(b) as essential to each license application. In addition, the requirements of Section 307(b) that the Commission shall make such distribution of available facilities among the different states

and communities as to give fair, efficient and equitable radio service to each, calls for the exercise of an informed judgment upon many other matters as well.

None of these powers and duties, however, are involved in this case. This appeal involves the validity of the assertion by the Commission of another power, the power to regulate the business of network broadcasting in accordance with its version of the anti-trust laws and to issue "the very sort of decree that a court charged with the duty of interpreting the anti-trust laws by way of equity injunction would write". This power finds no express sanction in the Act, and must find support either in the Commission's licensing authority or in the ninth of the eighteen subdivisions of Section 303 giving the Commission authority to issue special regulations applicable to radio stations engaged in chain broadcasting. These will be taken up in order.

**1. The Asserted Power Cannot be Derived from the Authority to License.**

Chairman Fly asked a clever question of Mr. Hennessey, counsel for NBC, in oral argument before the Commission. He asked whether the Commission could, with due regard for the public interest, license every station in the United States to one person. Mr. Hennessey replied that he thought it could. The Government has made much of this answer but it has wholly misunderstood its intendment.

The question was asked with respect to the jurisdiction of the Commission to adopt certain proposed regulations similar to those finally promulgated by the Order and equally premised upon the principles and the policies of the anti-trust laws. The answer meant that in so far as considerations of competition and monopoly under the anti-

trust laws were concerned, they were beyond the scope of the power committed to the Commission.

Obviously, considerations other than considerations of competition and monopoly under the anti-trust laws, considerations such as the duty under Section 307(b) so to distribute available facilities among the different states and communities as to give fair, efficient and equitable radio service to each, might require an opposite result. It is also reasonable to construe the legislative history of the Act as evidencing a Congressional intent that too many facilities should not be licensed to one person. Such considerations may evidence a policy against what might be called a "monopoly" of radio licenses, but they do not support the Order.

The desires of Congress with respect to the geographical distribution of available facilities or with respect to the acquisition of too many stations by one person have a conceivable bearing only upon regulation 3.106 which is, as we have said, the only regulation promulgated by the Order which may fairly be said to relate to the Commission's licensing function. The issue in this case, however, is whether the power to license is sufficient to support the indirect regulation of business practices in network broadcasting pursuant to the policies of the anti-trust laws.

In so far as the Commission purports to use its licensing power to deal with restraints on competition or practices tending thereto in network broadcasting, that power must be interpreted in conformity with other sections of the Act, the most important of which are Sections 311 and 313.

**Sections 311 and 313**

Section 313 expressly makes all anti-trust laws applicable to interstate or foreign radio communications and

provides that when any licensee has been "found guilty" of a violation of such laws in any civil or criminal action brought thereunder, the court may order the revocation of its license, in addition to the penalties prescribed by the anti-trust laws.

This Section is apparently the fundamental basis for the Commission's claim to the power and duty to enforce competition in radio broadcasting according to its theories of the principles and policies of the anti-trust laws. While dissenting from the Commission's claim to power under Section 313, appellants do not want to be understood as claiming that radio broadcasting was not intended to be a competitive industry. The precursor of Section 313 in the Radio Act of 1927 was enacted at a time when Congress thought that the comprehensive regulation of a specific industry might be deemed to exclude that industry from the anti-trust laws. Radio was therefore expressly made subject to the anti-trust laws. No one, after reading the Section, could doubt that radio, like most other industries, is meant to be competitive, and the opinion of this Court in *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U. S. 470 (1940), makes this conclusion doubly clear. But it is also clear that Section 313 is directed to the Department of Justice and the courts and not to the Federal Communications Commission. This is made fully apparent in the companion section to Section 313, namely, Section 311.

Section 311 requires that the Commission deny a station license to any person whose license has been revoked by a court under Section 313, and authorizes the Commission to refuse such license to any other person who

> "• • • *has been finally adjudged guilty by a Federal court* of unlawfully monopolizing, or attempt-

ing unlawfully to monopolize, radio communication, directly or indirectly, through the control of the manufacture or sale of radio apparatus, through exclusive traffic arrangements, or by any other means, or to have been using unfair methods of competition."

The language of Sections 311 and 313 is clear and specific. It sets forth in detail the conditions under which a Federal court, on the one hand, may revoke a license issued by the Federal Communications Commission, and the conditions under which the Commission, on the other hand, may refuse a license on account of the anti-trust laws and *authorizes the Commission to deny a license on account of the anti-trust laws only after there has been a final adjudication of a violation of those laws by a Federal court.*

Both Sections 311 and 313 of the Communications Act of 1934 were found in the Radio Act of 1927 as Sections 13 and 15, respectively. Section 15 of the Radio Act of 1927 was reenacted verbatim as Section 313 of the Communications Act of 1934. Section 13 of the Radio Act of 1927 directed the Federal Radio Commission to revoke the license of any licensee who had been finally adjudged guilty by a Federal court of violating the anti-trust laws, whether or not the Federal court had itself revoked the license.* As Section 311 of the Communications Act of 1934, however, the Section directs the Federal Communications Commission to

* The full text of Section 13 of the Radio Act of 1927 appears in Appendix D, p. 59. The language here under discussion reads as follows:

"The licensing authority is hereby directed to refuse a station license * * * to any person * * * which has been finally adjudged guilty by a Federal court of unlawfully monopolizing * * * radio communication * * * or to have been using unfair methods of competition."

refuse a license to any person who has been finally adjudged guilty by a Federal court of violating the anti-trust laws only when the Federal court has revoked the license. If the Federal court has not revoked the license, the Commission is not directed but *authorized* to deny the license.

The amendment certainly does not any more empower the Commission to determine whether or not the anti-trust laws have been transgressed than did the original Section, but only empowers the Commission to determine whether a transgression of the anti-trust laws found by a Federal court has any bearing upon the issuance or denial of a radio broadcasting license whereas previously the Commission had no such discretion.

The District Court fell into plain error in dealing with these Sections. It stated:

> "Section 13 of the Radio Act of 1927 had provided that if a court revoked a license, the Commission must refuse to renew it, but it had stopped there; and, as the law then stood, it might perhaps have been argued with some show of plausibility that an applicant's monopolistic or unfair competitive practices in the past were not relevant to the grant of a license". (R. 525)

Section 13 of the Radio Act of 1927 did not read as the District Court stated but instead provided that if an applicant had been finally adjudicated by a Federal court of a violation of the anti-trust laws, the license must be denied whether or not the Federal court had revoked the license itself. The adjudication by the Federal court even though unaccompanied by the revocation of the license was so "relevant" to the grant of a license by the Commission that it precluded the Commission from issuing one.

As they then stood Sections 13 and 15 were in conflict, for there was no point to leaving a discretion in the court not to revoke the license when the Commission was nonetheless required to refuse it. In order to harmonize these Sections the amendment of Section 13 in 1934 directed the Commission to revoke the license only when it had been revoked by the Federal court and merely authorized the Commission to refuse a license if the court had made the adjudication without adding that penalty. The adjudication of a violation of the anti-trust laws by a Federal court was thus made less "relevant" to the grant of a license than it was before.

The fact remains that neither Section 13 of the Radio Act of 1927 nor Section 311 of the Communications Act of 1934 made the anti-trust laws relevant to a licensing proceeding at all until after a violation had been not only adjudged but *finally* adjudged by a Federal court.

If the Commission were held to have jurisdiction under its licensing authority to refuse a license on the basis of its own finding that the applicant had used unfair methods of competition or had been guilty of monopoly or an attempt to monopolize, the express requirement of Section 311 that such applicant must first be "finally adjudged guilty by a Federal court" would be superfluous.

Further, Section 602(d) amends Section 11 of the Clayton Act and expressly confers jurisdiction to enforce compliance with Sections 2, 3 (covering arrangements for exclusive dealing), 7 and 8 of the Clayton Act upon various administrative bodies, including the Federal Communications Commission, as follows:

> "Sec. 11. That authority to enforce compliance with sections 2, 3, 7 and 8 of this Act [i.e., the Clayton

> Act] by the persons respectively subject thereto is hereby vested: In the Interstate Commerce Commission where applicable to common carriers subject to the Interstate Commerce Act, as amended; *in the Federal Communications Commission where applicable to common carriers engaged in wire or radio communication or radio transmission of energy;* * * * and in the Federal Trade Commission where applicable to all other character of commerce, to be exercised as follows:"

When the foregoing provision is read in connection with Section 3(h) of the Communications Act of 1934 providing that "a person engaged in radio broadcasting shall not in so far as such person is so engaged, be deemed a common carrier", it is obvious that the Communications Act and the Clayton Act have been deliberately framed so as to exclude a delegation of authority under the Clayton Act to the Federal Communications Commission in so far as radio broadcasting is concerned.

That the scope of the Commission's licensing authority is limited and not expanded by Sections 311, 313 or 602(d) should be apparent. It is a well settled rule of statutory construction that when a matter is specifically provided for in a statute a general provision is inoperative with respect to the matter covered specifically. As stated by this Court in *United States* v. *Chase*, 135 U. S. 255 (1890):

> "It is an old and familiar rule that, 'where there is, in the same statute, a particular enactment, and also a general one, which, in its most comprehensive sense, would include what is embraced in the former, the particular enactment must be operative, and the general enactment must be taken to affect only such cases within its general language as are not within the provisions of the particular enactment.' *Pretty*

> v. *Solly*, 26 Beavan, 610, per Romilly, M. R.; *State* v. *Comm'rs of Railroad Taxation*, 37 N. J. Law, 228. This rule applies wherever an act contains general provisions and also special ones upon a subject, which, standing alone, the general provisions would include. Endlich on the Interpretation of Statutes, 560." (p. 260)

See also *Ginsberg & Sons* v. *Popkin*, 285 U. S. 204 (1932).

The leading case discussing the scope of the Commission's licensing authority is *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U. S. 470 (1940). There the licensee of a standard broadcast station appealed from the Commission's action in granting a license for a competing station upon the ground that the Commission had failed to weigh the economic injury which would be suffered by the appellant as the result of competition by the new station licensee. After stating the purpose of the radio sections of the Communications Act of 1934 the Court pointed out that Congress did not subject radio to common carrier regulation, although the financial ability of a licensee to render the best practicable service to its community is expressly made relevant to the licensing authority of the Commission under Section 308(b). The Court went on to say, at page 475:

> "But the Act does not essay to regulate the business of the licensee. The Commission is given no supervisory control of the programs, of business management or of policy. In short, the broadcasting field is open to anyone, provided there be an available frequency over which he can broadcast without interference to others, if he shows his competency, the adequacy of his equipment, and financial ability to make good use of the assigned channel.
>
> * * * * * *

> "Plainly it is not the purpose of the Act to protect a licensee against competition but to protect the public. *Congress intended to leave competition in the business of broadcasting where it found it, to permit a licensee who was not interfering electrically with other broadcasters to survive or succumb according to his ability to make his programs attractive to the public.*"

With this express statement that the Commission was given no jurisdiction over the general economic and business practices in radio broadcasting the Court also stated that the question of competition between a proposed station and an existing station was not to be entirely disregarded by the Commission. That question might have a vital and important bearing upon the economic ability of either station adequately to serve the public.

Since the financial ability of a licensee adequately to serve the public is clearly made relevant to the Commission's licensing authority under Section 308(b), it is obvious that the effect of competition may have a bearing upon that question. This, however, is far from importing concepts of competition and monopoly under the anti-trust laws into the licensing authority. Section 311 is the only section in the Act that could conceivably be said to import any concept with respect to the anti-trust laws into the licensing authority. It permits the Commission to consider monopoly only after a monopoly has been finally adjudicated such by a Federal court. Section 313, on the other hand, providing for the general applicability of the anti-trust laws to radio broadcasting is not directed to the Commission but to the Federal courts.

The statute has so been construed by the Chairman of the Commission himself. In 1940 the Commission was

asked its opinion with respect to the consent decree entered in the District Court of Delaware to which Radio Corporation of America, General Electric Company, Westinghouse Electric & Manufacturing Co., American Telephone and Telegraph Company, and others, were parties. Chairman Fly wrote a letter to Senator Wheeler, Chairman of the Senate Committee on Interstate Commerce, in which he stated:

> "The Commission deems it inappropriate for it to comment on the consent decree in the Radio Corporation of America antitrust case. *The reference in the Communications Act to antitrust activity is directed to the courts and the prosecution of such matters is, of course, vested in the United States Department of Justice.*" (Hearings before Senate Committee on Interstate Commerce on the nomination of Thad H. Brown, 76th Cong., 3d Sess. (1940), p. 235).

The reason for requiring a final adjudication by a Federal court before the Commission can revoke or deny a license on the basis of the anti-trust laws or the policies of those laws is clear. It is not because of "the mysteries enveloping an adjudication of 'guilt' under the Anti-Trust laws which make that issue unfit to be entrusted as such to profane hands" as the District Court would have it (R. 527). The point is that the anti-trust laws do not express a policy of unlimited competition that he who runs may read and apply. As stated by Chief Justice (then Mr. Justice) Stone in *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469 (1940), at page 489:

> "The prohibitions of the Sherman Act were not stated in terms of precision or of crystal clarity and

the Act itself did not define them. In consequence of the vagueness of its language, perhaps not uncalculated, *the courts have been left to give content to the statute*, and in the performance of that function it is appropriate that courts should interpret its word in the light of its legislative history and of the particular evils at which the legislation was aimed."

The substance of the anti-trust laws is largely judge-made law, to be interpreted and applied by the courts according to the limitations thereof, including the rule of reason, under which only *unreasonable* restraints on trade are prohibited.* Not even the Department of Justice itself purports to enforce the anti-trust laws by laying down broad edicts applicable to a whole industry. The whole machinery of the enforcement of the anti-trust laws is based upon the deciding of specific cases by the courts.

Moreover, the remedies provided for in the anti-trust laws have always been construed to be exclusive.** A reference has already been made to the suits in equity brought in Chicago by the Anti-Trust Division of the Department of Justice against NBC and CBS with respect to the very same matters which are made the basis for the present Order of

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* See, e.g. *Standard Oil Co. of New Jersey* v. *United States*, 221 U. S. 1 (1911); *United States* v. *American Tobacco Co.*, 221 U. S. 106 (1911); *Chicago Board of Trade* v. *United States*, 246 U. S. 231, 238 (1918); *Standard Oil Co.* v. *United States*, 283 U. S. 163, 169 (1931); *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469 (1940).

** *Minnesota* v. *Northern Securities Company*, 194 U. S. 48 (1904); *General Investment Company* v. *Lake Shore & Michigan Southern Railway Company*, 260 U. S. 261 (1922); *U. S.* v. *Cooper Corporation*, 312 U. S. 600 (1941); *Thatcher Manufacturing Company* v. *F. T. C.*, 272 U. S. 554 (1926); *Arrow-Hart & Hegeman Electric Co.* v. *F. T. C.*, 291 U. S. 587 (1934); cf. *Terminal Warehouse Co.* v. *Pennsylvania Railroad Co.*, 297 U. S. 500 (1936).

the Federal Communications Commission. Appellants are at the very least entitled to a determination of the legality of their business practices by a court pursuant to the rule of reason. *"Otherwise national policy on such grave and important issues as this would be determined not by Congress nor by those to whom Congress had delegated authority but by virtual volunteers."* Mr. Justice Douglas in *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150 (1940), speaking with respect to the approval by the Petroleum Administrative Board of practices under the anti-trust laws.

That the interest appellants have of being accorded the safeguards of a judicial trial before a court under the anti-trust laws is not merely academic but of the highest practical importance is apparent from the following statement of the minority Commissioners:

> "The majority appears to conclude that it is necessary to exert control over certain business policies of radio station licensees in much the same manner as has been proven suitable for public utilities other than radio. However, in arriving at this conclusion there appears to have been no weighing of the advantages and the disadvantages of the present broadcast structure in terms of good program service to the public. Hence, no conclusions based upon evidence in the record have been made of the reasonableness of the present practices of the industry. For 14 years, existing contract arrangements have been enforced both through formal and informal agreements, and broadcasting in America has achieved greater progress than in any country in the world. The record does not disclose that there is *unreasonable* restraint of competition resulting from certain contracts which the majority proposes to prohibit." (R. 153)

**The Provisions Concerning Transfer of Licenses**

Further seeking to import the desired meaning to the licensing authority, the Commission relies upon Section 309(b)(2), providing:

> "(2) Neither the license nor the right granted thereunder shall be assigned or otherwise transferred in violation of this Act."

and Section 310(b), providing:

> "(b) The station license required hereby, the frequencies authorized to be used by the licensee, and the rights therein granted shall not be transferred, assigned, or in any manner either voluntarily or involuntarily disposed of, or indirectly by transfer of control of any corporation holding such license, to any person, unless the Commission shall, after securing full information, decide that said transfer is in the public interest, and shall give its consent in writing."

The sections are clearly designed to enable the Commission to pass upon the qualifications of station licensees who become such by transfer rather than by an original application. Otherwise the considerations specified in the Act as relevant to the original issuance of a license could be avoided. These considerations include the financial and technical competence of the applicant, and it may be conceded that these considerations also include the question as to how many stations should be licensed to one person. Certain statements by the sponsors of the Radio Act of 1927 made on the floor of the House and of the Senate (*infra*, pp. 74, 77) indicate an intention that the Commission should allocate available facilities among applicants as well as geographically.

As has been pointed out above, however, the desire of Congress with respect to the allocation of facilities either geographically or among applicants have nothing to do with the principles and policies of the anti-trust laws, although it can be described as relating to "monopoly". Whether called a problem of "monopoly" or by some other name, the number of licenses to be issued to one person is a separate problem which obviously must be dealt with by the Commission and cannot be exclusively committed to the Department of Justice and the courts. The contrary is true of restraints upon competition.

**Statutory History of the Licensing Authority**

It is not contended by appellants that Congress in enacting the Radio Act of 1927 did not take into account considerations relating to monopoly and restraints of trade under the anti-trust laws. The Act of 1927 and some of the bills leading to its eventual passage were introduced into Congress at a time when there was litigation before the Federal Trade Commission concerning the contracts between American Telephone and Telegraph Company, Radio Corporation of America, General Electric Company, Westinghouse Electric & Manufacturing Company and others relating to patents, and this litigation was brought to the attention of Congress. It is, however, contended by the appellants that the power to make findings of fact and conclusions with reference to monopoly and restraints of competition was specifically denied to the Commission: this is further borne out by the following statutory history.

H. R. 13773, one of the early bills to amend the Act of 1912 introduced in the 67th Congress, 4th Session (1923), contained a provision in Section 2(C) thereof that the

Secretary of Commerce (then the licensing authority) was authorized to refuse a station license to anyone who in his judgment was monopolizing radio communication.*

A similar provision was contained in Section 2(C) of H. R. 7357, introduced in the 68th Congress, 1st Session (1924), save that in H. R. 7357, the Secretary of Commerce was *directed* to refuse a station license to anyone who in his judgment was monopolizing radio communication.**

This bill also contained Section 2(G) (now Section 313 of the Communications Act of 1934), declaring the anti-trust laws applicable to radio communication and providing that a Federal court, upon finding a licensee guilty of monopoly, might revoke the license.†

In the hearings before the Committee on the Merchant Marine and Fisheries with reference to this bill, *Secretary Hoover testified that he disapproved of the section requiring the Secretary of Commerce to make a judgment as to monopoly in radio communication because the determination as to monopoly was a difficult legal question that did not properly belong to any administrative body.* He advocated the procedure requiring the finding of monopoly to be made by a court.††

In H. R. 5589, introduced in the 69th Congress, 1st Session (1925), Section 2(C) was amended so as to provide that the Secretary of Commerce was directed to refuse a station license only to one who had been found guilty by a Federal court of unlawfully monopolizing radio communication.‡‡ *A series of amendments was proposed by*

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* See Appendix D, p. 55.

** See Appendix D, p. 56.

† See Appendix D, pp. 56-57.

†† See Appendix D, pp. 57-58.

‡‡ See Appendix D, p. 59.

*the Congressional minority to give the licensing authority jurisdiction to determine the facts of monopoly. All of these amendments were uniformly rejected.** All subsequent bills and the Radio Act of 1927, as finally passed, required that there be an adjudication of monopoly by a Federal court before the Commission was empowered to refuse a license on the ground of monopoly.

Speaking on July 1, 1926, with reference to H. R. 9971, a successor of H. R. 5589 in the 69th Congress, 1st Session, which contained the above described division of jurisdiction, and which, moreover, contained the provision giving the licensing authority the power to make regulations with respect to chain broadcasting, Senator Dill, the sponsor of the radio bills in the Senate, stated on the floor of the Senate:

> "Mr. Dill: The bill provides that in case anybody has been convicted under the Sherman anti-trust law or any other law relating to monopoly he shall be denied a license; *but the bill does not attempt to make the commission the judge as to whether or not certain conditions constitute a monopoly; it rather leaves that to the court.*" (Cong. Rec., Vol. 67, Part 11, p. 12507.)

When H. R. 9971 was reported out of a committee of conference of the Senate and House in the 69th Congress, 2nd Session, Senator Dill then answered an inquiry by Senator Pittman as follows:

> "Mr. Pittman: I understand; but *it is evident that the House did not intend that the commission to be appointed under this bill should have the determination of the question as to whether there was a*

* See Appendix D, pp. 60-64.

*monopoly existing* or whether there were overcharges or whether there were discriminations, and the reasons why they expressly left that out was because there were two bodies, each dealing with those subjects.

"Mr. Dill: *The Senator is correct in that.*" (Cong. Rec., Vol. 68, Part 3, p. 3034.)

If the interpretation Senator Dill put upon his bill in the foregoing statements upon the floor of the Senate be not sufficient to disclose Congressional intent, the amendment which he offered in the 73rd Congress, 2nd Session (1934), to S. 3285, one of the bills leading to the Communications Act of 1934, makes it abundantly clear.

After that bill had been reported from the Committee on Interstate Commerce, and there had been some debate upon it, Senator Dill offered the following amendment to Section 307 on the floor of the Senate:

"(f) In granting applications for licenses or renewals of licenses for frequencies to be used for broadcasting, the commission shall so distribute such licenses that no licensee nor organization of licensees, whether effected by purchase, lease, chain broadcasting, or other method, shall be able to monopolize or exercise dominant control over the broadcasting facilities of any community, city, or State, or over the country as a whole, and the commission shall, so far as possible, by its distribution of licenses, provide for broad diversification and free competition in broadcast programs to be presented to radio listeners." (Cong. Rec., Vol. 78, Part 8, p. 8851.)

In connection therewith Senator Dill made the following statement:

"Mr. Dill: The purpose of the amendment is to make it impossible for any one man or organization to have control of the broadcasting facilities of a community, State, or the country if there are other applications from responsible applicants. At the present time there is growing up in many cities the practice of the owner of an important station leasing the facilities of another important station and then organizing a corporation to control a third station, and as a result the one station gets complete control of the broadcasting of the community. The purpose of the amendment is to give the commission a reason, if there be a suitable applicant, for granting a license to another applicant and to break up that kind of practice if the commission shall find it necessary. It is a permissive amendment." (Cong. Rec., Vol. 78, Part 8, p. 8851.)

This amendment was agreed to and the bill was passed by the Senate. Upon the enactment of a *different* bill by the House there was a conference and in the conference report is found the following statement:

"The substitute bill agreed to in conference omits the paragraph of the Senate bill no. 307(f), which carried a new provision requiring the Commission to distribute broadcasting licenses so that no one licensee or organization of licensees should exercise dominant control over the broadcasting facilities of any locality." (Cong. Rec., Vol. 78, Part 10, p. 10987.)

The significance of the rejection by Congress of this amendment proposed by Senator Dill becomes apparent when the power asserted by the Commission is compared with the power denied to it by the rejection of this amendment.

**2. The Asserted Power Cannot be Derived from the Authority to Make Special Regulations Applicable to Radio Stations Engaged in Chain Broadcasting.**

The Government attempts to override all objection to the validity of the Order as exceeding the Commission's licensing authority by calling attention to the ninth of eighteen subdivisions of Section 303.

Subdivision (i) of Section 303 provides that the Commission shall "have authority to make special regulations applicable to radio stations engaged in chain broadcasting." When this subdivision of Section 303 is read in connection with the others, it appears that Section 303 in its entirety relates solely to the technical problems of the radio broadcasting art. The general language of subdivision (i) cannot be interpreted at variance with its immediate context.

Section 303 in its present form can best be understood by reviewing its textual development. In hearings before the Committee on Merchant Marine and Fisheries of the House of Representatives on H. R. 7357, a bill to amend the Act of 1912 introduced in the 68th Congress, 1st Session (1924), Secretary of Commerce Hoover testified that at that time his Department had the impossible task of attempting to police 20,000 radio stations in the United States.* It was to deal with the technical problems of interference resulting from such a mass of broadcasting stations that H. R. 5589, another precursor of the Radio Act of 1927, introduced in the 69th Congress, 1st Session (1925), provided in Section 1(B)** thereof that the Secretary of Com-

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* See Appendix D at pp. 57 and 58.

** The textual development of Section 303 of the Communications Act of 1934 is set forth at pp. 64-71 of Appendix D.

merce, as public convenience, interest or necessity required, should:

classify radio stations;

prescribe the nature of the service to be rendered by each station;

assign bands of frequencies or wave lengths to the various stations;

determine the power which each station should use and the time during which it should operate;

determine the location of stations and the kinds of instruments to be used;

regulate the purity and sharpness of emissions from each station;

establish areas or zones to be served by any station;

inspect licensed stations and their apparatus;

make such regulations as are deemed necessary to prevent interference between stations and to carry out the provisions of the Act.

The substance of this Section 1(B) of H. R. 5589 appears in Section 4 of the Radio Act of 1927, save that the power to inspect stations was omitted and the Radio Commission (substituted for the Secretary of Commerce as the licensing authority) was given further authority:

to make special regulations applicable to radio stations engaged in chain broadcasting;

to make general rules and regulations requiring stations to keep records of programs, transmissions of energy, communications or signals;

to exclude from the requirements of any regulations any radio stations upon railroad rolling stock;

to hold hearings.

Section 4 of the Radio Act of 1927 is substantially incorporated in Section 303 of the Communications Act of 1934, save that the authority to hold hearings is no longer contained in this part of the Act and the Communications Commission (substituted for the Radio Commission) was given the further authority (most of which was held by the Federal Radio Commission under Section 5 of the 1927 Act):

to study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest;

to prescribe the qualifications of station operators and to classify them according to duties to be performed;

to suspend the license of any operator if he had done certain things;

to inspect transmitting apparatus;

to designate call letters of all stations;

to publish such call letters and other announcements and data;

to require the painting and/or illumination of radio towers if the Commission deemed that they might constitute a menace to air navigation.

Section 303 of the Communications Act of 1934 was amended in 1937 to expand the conditions under which an operator's license could be revoked, to expand the inspec-

tion provisions and to give the Commission power to make such rules and regulations as might be necessary to carry out provisions of the Act or any international radio treaty.

It is apparent that Section 303 as a whole is intended to supplement the licensing power by giving the Commission authority to ensure the orderly use of the available frequencies by rule, regulation, classification or otherwise.

To seize upon one subdivision of a long and particularized section relating to technical and physical matters, enacted for the guidance of a Commission expert in that field, and use that subdivision as a justification for the making over of the entire radio broadcasting system of the United States, not even upon technical or physical grounds but upon ill-considered notions as to the regulation of business practices, is a patent usurpation of power.

This is made even more apparent by the fact that subdivision (i) refers to *stations*, not to licensees. It is obvious that power to regulate the contracts of licensees of standard broadcast stations according to the dictates of theories of competition cannot be premised upon authority to make special regulations applicable to the physical *stations*.

The authority to make special regulations applicable to radio stations engaged in chain broadcasting is subject to the same difficulties under the First Amendment as the phrase, "public interest, convenience or necessity" or "larger and more effective use of radio in the public interest." If the bald words of the subdivision may be said to authorize the chain broadcasting regulations on their face, as the Commission claims, they equally authorize regulations dealing directly with network programs.

A regulation stating that no license will be issued to any standard broadcast station engaged in chain broadcasting should it broadcast programs of political discussion would obviously be a special regulation applicable to radio stations engaged in chain broadcasting. It would equally obviously not be supported by Section 303(i).

**Legislative History of Section 303(i)**

The major concern of Congress arising from the problems of interference which resulted from the deficiencies of the Act of 1912 was to relieve congestion. The problem was not only one of numerical congestion but one of conflicting use of the same wave lengths and of relative power. The receiving sets then in use were not well adapted to selecting the desired station and tuning out others, and the powerful stations were likely to drown out less powerful stations over a wide sector of the dial. There was considerable fear that a claim of vested rights to the wave lengths and power then used by broadcasters might thwart the Congressional objective of an orderly use of the air. Although this fear often expressed itself as a fear of "monopoly," it is important to recognize that it was a fear lest the chaotic state of the air be made an unchangeable *status quo*, and it was not a question of restraints upon competition.

Much of the Congressional discussion about "monopoly" in the radio broadcasting field had to do with this aspect of the problems of interference, and the power to deal therewith was granted to the Commission by declaring that there were no vested rights in the air and by giving the Commission the power to license and allocate frequencies and wattage in an orderly manner. Compare *Federal Com-*

*munications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134 (1940):

> "Congress moved under the spur of a widespread fear that in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcasting field. To avoid this Congress provided for a system of permits and licenses. Licenses were not to be granted for longer than three years. Communications Act of 1934, Title iii, §307(d). No license was to be 'construed to create any right, beyond the terms, conditions, and periods of the license.' *Ibid.*, §301. In granting or withholding permits for the construction of stations, and in granting, denying, modifying or revoking licenses for the operation of stations, 'public convenience, interest, or necessity' was the touchstone for the exercise of the Commission's authority." (pp. 137-8)

The development of chain broadcasting beginning in 1924 gave rise to a new accentuation of the same problem. The high-power stations, although geographically separated, were operating upon a variety of wave lengths, and, due to the unselective nature of the receivers then existing, these high-power stations were likely to be the only ones that could be heard wherever the dial was turned. Because there were few high-power stations, and because there was only one organization distributing programs over wirelines, these stations were all likely to be carrying the programs of that one network, and the radio audience could often hear nothing else. Thus in many areas high-power stations were blanketing more than one sector of the dial with programs which were duplicates of each other. The idea was current that it might be possible to deal with the

special problems of interference connected with this early chain broadcasting by assigning special frequencies to stations engaged in chain broadcasting or in some similar manner.

In hearings before the Senate Committee on Interstate Commerce on S. 1754, introduced in the 69th Congress, 1st Session, 1925, Senator Dill raised the problem of chain broadcasting for the first time in a question to Stephen B. Davis, Jr., Solicitor of the Department of Commerce:

> "Senator Dill. I want to ask Judge Davis a question about another subject not covered in this bill, but which I want to have considered; and that is the subject of chain broadcasting. During the past few months there has grown up a system of chain broadcasting, extending over the United States a great deal of the time. I say a great deal of the time—many nights a month—and the stations that are connected are of such widely varying meter lengths that *the ordinary radio set that reaches out any distance is unable to get anything but that one program, and so, in effect, that one program monopolizes the air. I realize it is somewhat of a technical engineering problem*, but it has seemed to many people, at least many who have written to me, that when stations are carrying on chain programs that they might be limited to the use of wave lengths adjoining or near enough to one another that they would not cover the entire dial. I do not know whether legislation ought to restrict that or whether it had better be done by regulations of the department. I want to get your opinion as to the advisability in some way protecting people who want to hear some other program than the one being broadcast by chain broadcast."

The whole colloquy between Senator Dill and Stephen B. Davis, Jr., is set forth at pages 72-74 of Appendix D to this brief. Thereafter the Senate Committee on Interstate Commerce reported out H. R. 9971 which added to the power of the Radio Commission in what was to become Section 4(h) of the Radio Act of 1927 (and subsequently Section 303(i) of the Communications Act of 1934), the authority:

> "When stations are connected by wire for chain broadcasting, [to] determine the power each station shall use and the wave lengths to be used during the time stations are so connected and so operated, and make all other regulations necessary in the interest of equitable radio service to the listeners in the communities or areas affected by chain broadcasting."

This language was reported by the Senate Committee on Interstate Commerce (Report No. 772, 69th Cong., 1st Sess., p. 3) as "complete authority • • • to control chain broadcasting". That this complete authority was technical in nature is apparent from the wording of the amendment, its context, and the fact that it refers not at all to licensees but to *stations*, power and wave lengths.

Evidently from the recognition that much of the wording of this amendment was superfluous in that the whole of Section 4 of the 1927 Act (Section 303 of the present Act) dealt with power of stations, wave lengths and other physical characteristics, it appeared in Section 4(h) of the Radio Act of 1927, as finally passed (now Section 303(i) of the Communications Act of 1934), as authority "to make special regulations applicable to radio stations engaged in chain broadcasting."

Whether or not the Congress thought that the general rule that regulations must have uniform application required that the Commission be given power to make "special" or different regulations applicable to radio stations engaged in chain broadcasting, it is apparent that the subdivision relates solely to technical problems of radio broadcasting which are special to chain broadcasting. Although Section 303(i) has been a part of the law governing radio broadcasting since 1927, there has been no previous attempt to construe it otherwise.

Indeed, in so far as the problem of high-power stations blanketing out less powerful stations is concerned, shortly after the enactment of the Radio Act of 1927 improvements in the selectivity of radio receivers and the Commission's allocation of frequencies and power under its licensing authority so reduced interference between stations that this problem was effectively taken care of without the use of Section 303(i).

The other problem sought to be dealt with by Section 303(i) was the problem of more than one station sending the same program to the same area, or the problem of duplication. The Commission devoted considerable time in its hearings in Docket No. 5060 to the question of the duplication of network programs, that is, the same network program being heard on different parts of the dial from a number of stations located at various points. The Commission was unable to reach any conclusion thereon. At page 50 of the Report of the Committee which summarized the evidence in Docket No. 5060 for the Commission, it is stated:

"2. Duplication of Programs

"The charts in the preceding subsection also show that there is a certain amount of duplication

of network program service—i.e., transmission of the same program in the same area by two or more outlets of the same network organizations. Network program duplication obviously should be held to a minimum. But the extent to which such duplication now exists is not entirely clear. Because of the extremely technical nature of this entire question, it is impossible to draw any conclusion at this time, and the subject should be investigated further."

**The Legislative History Relied Upon by the Commission**

The foregoing history and analysis of the Communications Act of 1934 and of the Radio Act of 1927 clearly show that Congress fully considered the problems of restraints upon competition in the radio broadcasting industry, and that Congress fully considered the problems relating to chain broadcasting. Aware of these problems, it left the technical problems of chain broadcasting to be dealt with under Section 303, and it empowered the Commission to deal with transgressions of the principles and policies of the anti-trust laws only after a court had supplied the fact and conclusion. The statutory history is so clear as to preclude any argument that the Congress delegated to the Commission the power to promulgate the present regulations.

Much has been made by appellees of statements by Representative (now Senator) White and by Senator Dill upon the floors of the House and the Senate defending the above described distribution of power in the Radio Act of 1927. Reference has already been made to the very vocal Congressional minority which desired that the Commission be given the power to adjudicate questions of monopoly and

to the fact that the majority thought it wiser to leave anti-trust problems to the Department of Justice, the courts and the Federal Trade Commission.

When the minority charged that the bill did not sufficiently protect against monopoly, Representative White and Senator Dill rose to defend. They thought that the bill as passed properly took care of the problem of vested rights in the air; the problem that many broadcast stations broadcasting the same program on many different wave lengths might blanket out other stations; and that the bill disposed of problems under the anti-trust laws by specifically leaving them to the courts. Consequently their ready answer to the minority was that their bill had taken care of monopoly and it is wholly unjustifiable to cite their language as to the anti-monopoly characteristics of the bill as passed to support a wholly different concept of the method by which the bill might have achieved its objectives, such as the concept at present advanced by the Commission.

When H. R. 9971 was reported out of a committee of conference of the Senate and House in the 69th Congress, 2nd Session, Representative White summed up the distribution of power in the Bill on January 27, 1927, on the floor of the House:

> "Something has been said about monopoly; in fact, a great deal has been said about monopoly. I assert that whatever there may be of monopoly in connection with radio today is not in the field of transmission, but it is in the control of patents. Every Member here knows that the Merchant Marine and Fisheries Committee of the House has no jurisdiction over the question of patents.
>
> . . . . . .

"But we have dealt with this question of monopoly in many ways. I have sketched off here as I sat at the table this afternoon the respects in which this bill deals with the question of monopoly. It starts out by asserting in the first place that the right to broadcast is to be based not upon the right of the individual, not upon the selfish desire of the individual, but upon a public interest to be served by the granting of these licenses. It places a limitation upon the right of the licensee to transfer his license at will; he may transfer that license only upon the express consent of the regulatory power of the United States. That is not all. We have provided that all laws of the United States relating to monopoly and agreements in restraint of trade shall be specifically applicable to the radio industry and to radio communication.

"*We have directed in this bill the licensing authority to refuse a license to any applicant found guilty of monopolizing or attempting to monopolize radio communication by any Federal court or by any other body vested with authority by law to make such a determination.* We have given jurisdiction in such cases to the licensing body, in truth we have *directed* the licensing power to revoke the license of a holder found guilty of such an offense. Then we have forbidden the merger in certain cases of radio and wire companies in order that we may preserve competitive conditions between these two means of communication.

"That is written expressly into this law. We have left intact and in force, supplementing this legislation, a great body of laws which now compose the interstate commerce acts of the United States. By those acts, in so far as they apply to radio companies, unjust charges are made unlawful. Discriminations are made unlawful; preferences, prejudices,

rebates, and all those things are made unlawful; and the Interstate Commerce Commission, under existing law, which, as I say, is left intact, supplementing this bill, is given wide authority and ample authority to make effective those principles of law laid down." (Cong. Rec., Vol. 68, Part 3, pp. 2579-2580.)

On February 3, 1927, Senator Dill, responding to a question concerning the blanketing of the air by chain broadcasting, gave his answer to various objections to the distribution of power:

"Mr. Broussard: I desire to ask the Senator from Washington a question which has been suggested to me by the remarks made by the Senator from Nevada [Mr. Pittman] and the questions asked by the Senator from Massachusetts [Mr. Walsh].

"I received this morning a telegram from Shreveport, La., signed by Mr. W. K. Henderson, who is a very wealthy man there, and who has a broadcasting station which he uses mostly to entertain his friends and to accommodate the public. I do not think he is making anything out of it. His telegram reads:

'Shreveport, La., January 31, 1927.

'Hon. Edwin S. Broussard,
United States Senate:

'Our Shreveport Times this morning carried headlines of 35 stations to be chained together. Just as I wired you the other day, chain stations will monopolize and independent stations, such as we have at Shreveport, are practically done for. Hope you will give bill considerable study and stand for interest of others beyond Radio Corporation of America who control chain stations. Between American Telephone & Telegraph Co. and Radio Corpora-

tion of America and other interests the independents are through.

W. K. HENDERSON,
Owner Radio Station KWKH.

"I should like to have the Senator from Washington cover the suggestion contained in telegram, and if the bill does actually make this impossible, to make that known to the Senate.

"Mr. Dill: I am very glad the Senator from Louisiana has asked the question. It gives me an opportunity to explain not only that but some things regarding what the Senator from Nevada said.

"In the first place, under this bill chain broadcasting today, concerning which the writer of the telegram is concerned, is absolutely without any regulation. We have no law today to handle the situation, and the various radio organizations, including the Radio Corporation of America and the American Telephone & Telegraph Co., are going ahead and building up the chain stations as they desire without let or hindrance and without any restrictions, because the Secretary of Commerce has no power to interfere with them. Unless this proposed legislation shall be enacted they will continue to do so, and they will be able by chain-broadcasting methods practically to obliterate the independent small stations, as the man who wrote the telegram suggests.

"While the commission would have the power under the general terms of the bill, the bill specifically sets out as one of the special powers of the commission the right to make specific regulations for governing chain broadcasting. As to creating a monopoly of radio in this country, let me say that this bill absolutely protects the public, so far as it can protect them, by giving the commission full power to refuse a license to anyone who it believes will not serve the public interest, convenience, or necessity. It specifically provides that any

corporation guilty of monopoly shall not only not receive a license but that its license may be revoked; and if after a corporation has received its license for a period of three years it is then discovered and found to be guilty of monopoly, its license will be revoked.

"In addition to that—

"Mr. Heflin: Mr. President—

"Mr. Dill: Just a moment. In addition to that, the bill contains a provision that no license may be transferred from one owner to another without the written consent of the commission, and the commission, of course, having the power to protect against a monopoly, must give such protection.

"I wish to state further that the only way by which monopolies in the radio business can secure control of radio here, even for a limited period of time, will be by the commission becoming servile to them. Power must be lodged somewhere, and I myself am unwilling to assume in advance that the commission proposed to be created will be servile to the desires and demands of great corporations of this country." (Cong. Rec., Vol. 68, Part 3, p. 2881.)

Thereafter the colloquy between Senator Dill and Senator Pittman referred to at pages 60-61 above took place on the floor of the Senate:

"Mr. Pitman: I understand; but *it is evident that the House did not intend that the commission to be appointed under this bill should have the determination of the question as to whether there was a monopoly existing* or whether there were overcharges or whether there were discriminations, and the reasons why they expressly left that out was because there were two bodies, each dealing with those subjects.

"Mr. Dill: *The Senator is correct in that.*" (Cong. Rec., Vol. 68, Part 3, p. 3034.)

That Representative White and Senator Dill interpreted the Act as analyzed above in this brief becomes apparent when it is recognized that the colloquy between Senator Dill and Senator Pittman took place after Senator Dill's speech defending the bill; and when the significance of his attempted amendment to the Radio Act in the 73rd Congress referred to on pages 61 to 62 above is appreciated.

In the court below the Government also relied upon certain legislative history including the history of Section 307(b) of the Communications Act of 1934 and the legislative history of the so-called Davis Amendment. The Government misconstrues this legislative history and it is set forth at pages 75 to 86 of Appendix D to this brief in case it is relied upon again. It is apparent that this legislative history refers only to the distribution of facilities geographically and among applicants, and has no relation whatever to restraints upon competition or the anti-trust laws.

## POINT III.

### The Commission Cannot Escape Its Duty to Evaluate and Decide Each License Application on Its Own Facts.

The licensing power delegated to the Commission by Sections 307(a) and 309(a) of the Act is the power and the duty to license individual applicants for radio stations if in each case the Commission finds upon all the facts of that case that the operation of the particular station by the particular licensee will serve the purposes of the Act. The latter section expressly provides that in the event the

Commission cannot decide favorably upon an application from an examination of the application itself, the applicant shall be granted a hearing.

The power and duty to decide particular cases does not include the power to foreclose the decision in each case by promulgating eight detailed substantive regulations determinative of all cases.

In *Waite* v. *Macy*, 246 U. S. 606 (1918), the Act of March 2, 1897, c. 358 (29 Stat. 604), provided for the establishment of standards "of purity, quality and fitness for consumption, of all kinds of tea imported," and made it unlawful "to import any merchandise as tea which is inferior in purity, quality and fitness for consumption to the standards" referred to. Tea when entered at the Customs House was first checked by an examiner to see if it met the prescribed standards, and upon protest was re-examined by a board of general appraisers, known as the Tea Board. The Act provided:

> "Sec. 10. That the Secretary of the Treasury shall have the power to enforce the provisions of this Act by appropriate regulations."

The Secretary promulgated a regulation for the guidance of the Tea Board which prescribed a test for the discovery of artificial coloring matter in tea and made the presence of any coloring matter an absolute ground for exclusion. Plaintiffs, tea importers, sued to enjoin the Tea Board from applying the test to plaintiff's tea, which was of superior quality but would be excluded under the regulation because it contained a minute quantity of innocuous coloring matter. The Court granted the injunction, saying through Justice Holmes:

"The regulation makes the presence of any coloring matter an absolute ground for exclusion. But the only grounds recognized by the statute are inferiority to the standard in purity, quality and fitness for consumption, words repeated over and over again in the act. It cannot be made a rule of law that any tea that has an infinitesimal amount of innocuous coloring matter is inferior in those respects to a standard that has a much greater amount of other impurities and is worth only a quarter as much. All extraneous substances are impurities, and the presence of any may be detected in any way found efficient. But one such substance cannot be picked out and accorded supremacy in evil by an absolute rule irrespective of any harm that it may do." (pp. 609-10)

In the present case, the only ground recognized by the statute for denial of an application for a license is that the proposed operation will not be "in the public interest, convenience or necessity" as determined by the Commission in each individual case upon its own facts. In each case this depends upon a multitude of factors to be analyzed and weighed by the Commission in the exercise of administrative discretion.

The point is further illustrated by *Work* v. *Mosier*, 261 U. S. 352 (1923), which arose under an Act of Congress authorizing distribution of certain lands among the Osage Indians, reserving, however, the mineral rights for the use of the tribe as a whole. These rights were to be leased by the Tribal Council, under rules prescribed by the Secretary of the Interior, and the royalties distributed quarterly to members of the tribe. In the case of minors, however, the Act provided that a minor's share should be paid quar-

terly to his parents "*Provided*, That if the Commissioner of Indian Affairs becomes satisfied that the said interest of any minor is being misused or squandered he may withhold the payment of such interest."

The income from the properties became so large that the Secretary of the Interior grew concerned over possible misuse and sacrifice of the minors' income if turned over to the unrestricted use of parents. Accordingly, the Secretary issued a general order declaring that thereafter all such income must be devoted solely to the care and use of the minor, that any other use would be deemed misuse, and that no more than $50 a month would be paid to parents on account of a minor's share unless a specific showing was made that the funds were being used for his specific benefit.

Plaintiffs sought to compel the Secretary to pay to them moneys due their minor children, alleging that the limitations imposed by the regulation were invalid. The court acknowledged that Congress had vested in the Commissioner of Indian Affairs, subject to the supervision of the Secretary of the Interior, discretion to look after the minor's interest and authority to withhold payment whenever he found misuse or squandering of the income by the parents. The Court then said:

> "The record shows that the Secretary enlarged this discretion vested in him and his subordinate into a power to lay down regulations, limiting in advance the amount to be paid to the parents to a certain monthly rate, and declaring that no use of the funds would be permitted which did not inure to the separate benefit of the minor. He was led to take this action, which was a departure from the

previous practice of the Department during the decade immediately following the passage of the act, because of the sudden increase in the income of the minors resulting from the bonuses given for mineral leases. However desirable such regulations were, in view of the changed circumstances, we think they were in the nature of legislation beyond the power of the Secretary. Congress has since met the need by an amendment to the Act of 1906 by the Act of March 3, 1921, 41 Stat. 1249.

"The direction to the Secretary to pay to the parents the income due to the minors is clear and positive. It is that the income 'shall be paid quarterly to the parents until said minor arrives at the age of twenty-one years.' The proviso 'That if the Commissioner of Indian Affairs becomes satisfied that the said interest of any minor is being misused or squandered he may withhold the payment' did not confer on him a power to determine in advance by general limitation a monthly rate in excess of which what was due minors should not be paid to parents, nor did it enable him to require before payment a showing that the income beyond such limited monthly rate was being used for the specific benefit of each child. Congress evidently intended that the Commissioner should through his agents keep track of the conduct of parents in the use of the income of their children and necessarily vested him and the Secretary with power to require an account of how the income was being used; but this was not a regulatory function to be exercised in advance of payment which is positively enjoined. The proviso imposes on the Commissioner the duty of supervising each case and determining from the circumstances whether there has been, in cases of payments made, misuse or squandering, and if so, of withholding further payment on account of it." (pp. 359-360)

In *Steinmetz* v. *Allen*, 192 U. S. 543 (1904), plaintiff had applied for a patent and had joined in the same application both process and apparatus claims. The examiner ordered a division, pursuant to Rule 41 of Practice in the Patent Office which required process and apparatus claims to be presented in separate applications. Plaintiff challenged the validity of this rule, and the Commissioner sought to justify it on the ground that the statute gave to the Patent Office a discretion to permit or deny a joinder of inventions.

The Court held that although the statute might permit the Patent Office to compel a division of applications in particular cases if the process and apparatus were found to be separate and distinct, it did not authorize compulsory division of inventions which were closely related. Whether inventions were so independent as to justify division called for the exercise of discretion and could only be decided by examination of each application on its facts. The Court said:

> "Some discretion is not an unlimited discretion, and if the discretion be not unlimited it is reviewable. In other words, the statute gives the right to join inventions in one application in cases where the inventions are related, and it cannot be denied by a hard and fixed rule which prevents such joinder in all cases. *Such a rule is not the exercise of discretion; it is a determination not to hear.* No inventor can reach the point of invoking the discretion of the Patent Office. *He is notified in advance that he will not be heard, no matter what he might be able to show. His right is denied, therefore, not regulated.* Such is the necessary effect of rule 41, as amended.
>
> "Without that rule the action of the Patent Office can be accommodated to the character of inven-

tions, and discretion can be exercised, and when exercised, we may say in passing, except in cases of clear abuse, the courts will not review it. But the rule as amended, as we have said, precludes the exercise of any judgment and compels the separation of claims for a process and claims for its apparatus, however related or connected they may be." (pp. 560-561)

In *Miller* v. *United States*, 294 U. S. 435 (1935), plaintiff had been issued a war risk insurance policy granting benefits for injuries causing total and permanent disability. Plaintiff, twelve years after discharge, having presented a claim to the Administrator of Veterans' Affairs which was disallowed, brought suit on the policy alleging loss of an arm and an eye. The War Risk Insurance Act, c. 77, 40 Stat. 555, provided separately for compensation allowances and war risk insurance in case of "total permanent disability." The provision with respect to compensation was amended in 1919 so as to bring conclusively within the term "total permanent disability" the loss of one hand and one eye, but no such amendment was carried into the insurance article of the Act. In 1930, however; the Administrator issued Regulation 3140 which declared that the loss of one hand and one eye "shall be deemed to be total permanent disability under yearly renewable term insurance." The Act conferred upon the Director of the Bureau authority "to make rules and regulations not inconsistent with the provisions of this Act, necessary or appropriate to carry out its purposes * * *."

The plaintiff contended that his injuries constituted total and permanent disability as a matter of law by virtue of the regulation. The Court held the regulation was both inapplicable and invalid. It was inapplicable because it was

promulgated long after plaintiff's cause of action matured, and would not be construed to operate retroactively. It was invalid because it attempted to convert the issue of disability, a question of fact requiring proof, into a conclusive presumption. With respect to the latter the Court said:

> "It is invalid because not within the authority conferred by the statute upon the Director (or his successor, the Administrator) to make regulations to carry out the purposes of the act. It is not, in the sense of the statute, a regulation at all, but legislation. The effect of the statute in force at the time of the adoption of the so-called regulation is that *in respect of compensation allowances,* loss of a hand and an eye shall be deemed total permanent disability as a matter of law. There being no such provision with respect to cases of insurance, the question whether a loss of that character or any other specific disability constitutes total permanent disability is left to be determined as matter of fact. *The vice of the regulation, therefore, is that it assumes to convert what in the view of the statute is a question of fact requiring proof into a conclusive presumption which dispenses with proof and precludes dispute. This is beyond administrative power.* The only authority conferred, or which could be conferred, by the statute is to make regulations to carry out the purposes of the act—not to amend it." (p. 439)

See also:

*Doran, et al.* v. *Eisenberg,* 30 F. (2d) 503 (C. C. A. 3rd, 1929).

The direct application of the foregoing decisions to the case at bar is apparent. In both the *Waite* case and the

*Miller* case, the statute expressly empowered the administrative agency to make regulations to enforce or to carry out the purposes of the Act. The Federal Communications Commission's power to make regulations is no more broad.

Both the Commission and the District Court urge that the application of the doctrines of the foregoing authorities to the present case would go far to destroy the power to make any regulations at all. In support of this argument and in default of other authority, the Commission has cited regulations made under its authority to assign bands of frequencies and its authority to make regulations necessary to prevent interference between stations, the validity of which appellants concede.

The fact that the Commission can perform some of its functions by way of regulations does not mean that the Commission may perform all of its functions by way of regulations and never exercise its primary licensing function. There are certain situations where it is necessary that the Commission exercise its discretion on the facts of individual cases and certain situations where the Commission must make *a priori* determinations. Appellants do not dispute the Commission's power to make regulations assigning bands of frequencies or otherwise classifying the radio spectrum. These matters must be done by general regulations if they are to be done at all, and cannot be made discretionary from case to case. Indeed, the Commission's power to make regulations classifying the radio spectrum have been held to be so peculiarly within the jurisdiction of the Commission as to be immune from any judicial review at all. *Pittsburgh Radio Supply House* v. *Federal Communications Commission*, 98 F. (2d) 303 (App. D. C. 1938).

Appellants do, however, dispute the validity of the Commission's attempt to abdicate its discretion by the promulgation of iron-bound rules in situations where the statute compels it to exercise that discretion on a case to case basis.

The point can be made more clear by comparing regulation 3.106 with the other regulations promulgated by the Order. Regulation 3.106 provides, in part:

> "No license shall be granted to a network organization, or to any person directly or indirectly controlled by or under common control with a network organization * * * for any standard broadcast station in any locality where the existing standard broadcast stations are so few or of such unequal desirability (in terms of coverage, power, frequency, or other related matters) that competition would be substantially restrained by such licensing."

Here the Commission has at least retained a modicum of discretion with respect to the disposition of a particular license application to which the regulation might be applied. Here also the applicant would be enabled to test the validity of the Commission's judgment as to a substantial restraint upon competition on appeal from the licensing proceeding.

The other regulations are quite different. They leave no room whatever for the exercise of the Commission's discretion from case to case. Further, if the validity of the Order is upheld in this suit no applicant for a license will be able to test the Commission's conclusions as to whether the proscribed contractual provisions in his particular situation constitute a substantial restraint on competition or are contrary to the public interest, convenience or necessity.

This Court stated in *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 138 (1940), that comparative considerations have governed the Commission's licensing function since the beginning of regulation under the Act of 1927. Now the Commission would substitute absolutism. As stated by this Court in *Columbia Broadcasting System, Inc.* v. *United States, et al.*, the companion case on these regulations:

> "The regulations are rules which in proceedings before the Commission require it to reject and authorize it to cancel licenses on the grounds specified in the regulations without more. (R. 486)
>
> • • • •
>
> "Here the Commission exercised its rule-making power by adopting regulations whose operation is not made subject to future administrative determinations, save only as the Commission may be called on to decide in any given case whether a station's contract with a network is within the regulations." (R. 488)

## POINT IV.

### The Order is Arbitrary and Capricious and This Contention Cannot Be Disposed of Upon the Hearings Held Before the Commission.

Appellants maintain that the Order of the Commission was entered in utter disregard of the Commission's stated functions under the Communications Act of 1934. The Commission has gone far beyond the intention of Congress in enacting Title III of the Act, has construed the statute so as to overstep the bounds of Article I, Section 1, of the Constitution, and has asserted powers wholly incompatible

with the First Amendment. Appellants believe that this Court can determine from the face of the Report on Chain Broadcasting, the Supplemental Report and the Order that the Commission has exceeded its jurisdiction and that the Order is invalid. It is submitted that the decision of the District Court dismissing appellants' complaint on the merits should be reversed and the cause remanded to that court for the issuance of a permanent injunction against the enforcement of the Order.

The remainder of this Point is based upon the hypothesis that the construction placed upon Title III of the Communications Act of 1934 by the Commission and the District Court is supportable.

Even assuming that the Act may validly be construed to enable the Commission to deal with the matters with which the Order is concerned, the question still remains whether the Order is not arbitrary and capricious. Appellants maintain that the Order was entered in utter disregard of the practical exigencies of network broadcasting.

The sum and substance of appellants' position as to the effect of forbidding the networks to obtain firm options on station time is succinctly expressed in the words of the Commission majority at page 64 of its Report:

> "Few sponsors are willing to spend large sums in building up a program series to be broadcast over a definite number of stations at a certain hour if some of the important stations are subject to withdrawal upon order of a dominant network." (R. 100)

Whether there be withdrawal or refusal, upon order of a "dominant" network, upon order of any network or upon order of anyone else makes no difference. The vital issue

is that time must be cleared if network broadcasting is to continue.

Whatever restraint upon competition may result from option time is such a restraint as is known to the law as reasonable because it is a necessary effect of network broadcasting over the facilities of independent station licensees. It is, in the words of Mr. Justice Brandeis in *Chicago Board of Trade* v. *U. S.*, 246 U. S. 231, 238 (1918), a restraint "such as merely regulates and perhaps thereby promotes competition," for without option time there could be no competitive nation-wide network broadcasting. Cohesive network organizations able to compete with other advertising media or with one another could not exist.

Appellants have shown that the Commission has not felt satisfied to deal with competition in the business of network broadcasting under the anti-trust laws with due regard to the limitations of those laws, including the rule of reason. The Order represents a pursuit on the part of the Commission of its own concepts as to restraints of trade to the point where the continuance of adequate network broadcasting services is rendered impossible.

The Commission has disclaimed the duty to find a violation of the anti-trust laws and has assumed a power to deal with network broadcasting utterly without limitation. Appellants have also shown in Point III that the Commission has likewise disclaimed any duty to evaluate its policy of unlimited competition upon the facts of individual license cases. Appellants maintain that this utter disregard of any defined responsibility under the Communications Act of 1934, together with the disastrous effect of the Order upon network broadcasting, clearly demonstrates that the Order is arbitrary and capricious.

Even if it be conceded that the Commission has the comprehensive power over business practices claimed by it, that power must still be exercised in a reasonable manner. To attribute an over-riding importance to concepts of unlimited competition to the exclusion of all the other considerations which must enter into any such comprehensive power is just as arbitrary and invalid (*Waite* v. *Macy*, 246 U. S. 606, *supra*) as a complete departure from a more narrowly defined jurisdiction. *Thompson* v. *Consolidated Gas Co.*, 300 U. S. 55 (1937); *Southern Pacific Company* v. *Interstate Commerce Commission*, 219 U. S. 433 (1911); *Ann Arbor R. Co.* v. *United States*, 281 U. S. 658 (1930); *International Ry. Co.* v. *Davidson*, 257 U. S. 506 (1922); *Morgan* v. *Nolan*, 3 F. Supp. 143 (S. D. Ind. 1933), affd. 69 F. (2d) 471 (C. C. A. 7th, 1934).

The District Court disposed of this contention by applying the substantial evidence rule to the record of the hearings held by the Commission prior to the promulgation of the Order and refusing to hold a trial itself. Appellants maintain that the record of the hearings held by the Commission prior to the promulgation of the Order is not sufficient to preclude the introduction of evidence before the District Court with respect to the validity of the Order.

The Communications Act of 1934 contains no requirement for a quasi-judicial hearing prior to the issuance of the type of order here in dispute and the Commission held no such hearing. Commission Order No. 37 entitled "Order Instituting Chain Broadcasting Investigation" (R. 27, 131) authorized the Commission to undertake an investigation to determine what special regulations applicable to radio stations engaged in chain or *other* broadcasting were re-

quired in the public interest; such investigation to include an inquiry into thirteen specified matters which are industry-wide in scope as well as all other pertinent and related matters. The scope of the thirteen specified matters in Order No. 37 can only be appreciated by reading them in detail. It is sufficient here to note that they range from the program policies of the various networks to technical problems of duplication of network programs.

The Order also covered all other pertinent and related matters including those covered in the so-called "report on social and economic data" of January 20, 1938. That report covered service to the people of the United States; the extent to which broadcasting assists in the development of national, community and individual well-being; the extending of good broadcast reception into American homes to the widest possible extent; program service; the character of licensees; the American system of radio; susceptibility of improvement; super-power on clear channels; 500 kilowatt stations; newspaper ownership of radio stations; criticism of the American system of broadcasting by education and labor; and profits made by broadcasting stations and business affiliations of licensees.

The investigation was just as broad as Order No. 37. It was obvious to everyone the Commission asked to attend the hearings that the Commission was conducting a general investigation for its general information. NBC treated the proceeding as such, and introduced evidence as to the general character of its operations. Only the technical problems of duplication were developed in detail.

Appendix E to this brief is a partial history of the procedure followed by the Commission in conducting its in-

vestigation into chain broadcasting pursuant to Order No. 37. That history clearly shows that the hearings held before the Commission pursuant to the chain broadcasting investigation do not constitute a sufficient record to preclude the introduction of evidence before the District Court. Counsel for the Commission stated that there were "no parties to this proceeding at all."* Commissioner Brown stated that it was "not an adversary proceeding."* Commissioner Walker stated that the investigation was not "a case that will be appealed anywhere."* Furthermore, in formulating its Order, the Commission by no means confined itself to the record made before it but considered also answers to questionnaires, its files, informal consultations and matters submitted to the Congress.†

Not only will a brief perusal of the cases dealing with the requisites of a hearing sufficient to preclude the parties thereto from introducing evidence before a court upon review readily satisfy the mind that such hearings must be conducted in a completely different manner‡, but it is obvious that issues as important as those here involved cannot be disposed of upon the basis of such a formless proceeding.

Indeed, the evidence was not sufficient to enable the majority of the Commission itself either to find that appellants' contracts violated the anti-trust laws or to evaluate

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* Appendix E, p. 92.

† Appendix E, pp. 93, 95-97.

‡ *Morgan* v. *U. S.*, 304 U. S. 1 (1938); *Ohio Bell Telephone Co.* v. *Public Utilities Commission of Ohio*, 301 U. S. 292, 302 (1937).

the effect of the Order upon network broadcasting. Although the Commission has urged in the Court below that "in this instance the care and patience with which the Commission fulfilled its appointed task are plain, even to the occasional reader, upon the face of its report," appellants submit that the following statement of minority Commissioner Craven in the hearings before the Committee on Interstate Commerce of the United States Senate on S. Res. 113, 77th Congress, 1st Sess. (1941), is relevant to that claim:

> "We are convinced that the majority itself does not realize the effect of their proposals upon broadcasting service to the public. For example, the original draft of what is now the majority report contained the following statement:
>
> "'* * * *We cannot now determine the competitive effect of such contractual provisions; or how they will work out in actual practice. They will have to be examined later in the light of all developments in the field of network broadcasting.*'
>
> "The foregoing statement was eliminated in the final draft of the report. However, in my opinion, there has never been a satisfactory explanation by any of the majority as to how their proposals will work out in practice" (pp. 261-262).

Commissioner Craven went on to testify:

> "The rules were received by the various Commissioners—the rules themselves, not the report—about 18 hours before the meeting in which the final votes were taken. Most of those hours were the night hours. * * *
>
> "* * * I will wager that the majority itself does not know what the rules mean. *Furthermore, I*

*know that one member of the majority believes one of the rules to be so impractical that it makes almost impossible the operation of chain broadcasting on a stable basis.*

"Senator Clark of Idaho: Which rule was that, if I may ask?

"Mr. Craven: On time option • • •" (pp. 268-269).

The importance of the issues in this case cannot be overestimated. The whole future of network broadcasting is at stake. Upon the present affiliation contracts has been built the finest national radio service in the entire world. Moreover, the availability of this instantaneous means of simultaneous national communication makes radio an incalculable national asset in peace and a vital necessity in time of war. Speeches explaining the progress of the war and informing the American people as to what is expected of them are heard over the facilities of national networks. Before the present network organizations are broken down through the abolition of option time, appellants are entitled to a full and fair trial as to the validity of their contracts, a trial which the chain broadcasting investigation did not accord them.

Of the 3,225 pages of testimony submitted by NBC in the hearings conducted pursuant to that investigation, only a small part dealt with affiliation contracts and only a fraction of that part was addressed to option time; even that was addressed to exposition rather than to defense.

The Commission, in its investigation, did not request the presence of the national advertisers who alone support network broadcasting. NBC and the other network organizations did not come forward with detailed evidence as to the reasonableness of their contracts nor call in the national

advertisers because they did not conceive such to be their duty. The proceeding was simply not one by which anyone expected to be bound.

The affidavit of Niles Trammell (R. 225, 248-250) submitted in support of appellants' motion for preliminary injunction specifies some of the results which will follow if the Order is permitted to become effective. Each of the present nation-wide networks is made up of a few large stations and many smaller stations, all of which are enabled to function as an integrated unit for the purposes of attaining simultaneous nation-wide circulation through their affiliation contracts with one of the four network organizations. If option time is outlawed the present network organizations will be unable to meet the requirements of national advertisers for simultaneous nation-wide circulation and national advertisers will be remitted to their own devices.

Remitted to his own devices it is inevitable that the national advertiser will seek to broadcast his program over the largest and most powerful stations in each area without regard to their network affiliations. These stations will give the most economical circulation and the national advertisers will compete for these stations to the exclusion of the others in each area.*

The resulting diversion of national advertising revenues to the best stations in each area will be disastrous. The national advertiser will not assume the burden of producing a continuous schedule of sustaining programs. The existing network organizations will no longer have either

* It must also be pointed out that the Order does not prevent stations from granting an option to advertising agencies. Advertising agencies would thus be enabled to obtain all the commercial benefits of option time without the obligation of assuming the duties of producing sustaining programs or making time available for matters of national significance.

the incentive or the funds to produce their existing schedules of sustaining programs. Moreover, the revenues which the smaller stations will be able to attract will be so reduced that they will be unable to afford even the cost of wire-lines, let alone the production of sustaining programs. The complete atrophy of the facilities over which public service programs are currently conveyed to the nation will follow. Instead of four vigorously competing nation-wide network organizations assuming the job of producing sustaining and news programs of national significance and expanding their service to parts of the country that could not otherwise have network programs, the best stations in each area will absorb a disproportionate share of available advertising revenues, to the irreparable injury of the present radio service.

These results of the Order are well-known in broadcasting and advertising businesses. They can be substantiated by testimony upon trial and they cannot be disproved by mere argument on the part of the Commission. The Commission purported to protect against the diversion of advertising revenues to the best station in each area by permitting network organizations to give the stations "first call" on their programs. This is no protection at all, for stations will give "first call" only to those who have the best commercial programs to offer, and under the Order the advertisers and the advertising agencies will schedule their programs directly.

The Commission's failure throughout this proceeding to give heed to or seek information with respect to the effect of the Order amply demonstrates the need for a full and fair exploration of the issues involved, an exploration such as can only be had at a trial where the parties can submit evidence bearing directly upon the question.

As has been pointed out above, appellants believe that the proper forum for the trial upon the validity of their contracts is the District Court in Chicago. If this contention be denied, appellants are nonetheless entitled to a full and fair trial in the District Court for the Southern District of New York.

## Conclusion.

For these reasons, it is submitted that the decision of the District Court dismissing appellants' complaint on the merits should be reversed and the cause remanded to that Court for the issuance of a permanent injunction against the enforcement of the Order or, in the alternative, for the issuance of a temporary injunction and the holding of a trial before that Court on the issues raised by the complaint and the answer to be filed by appellees.

Respectfully submitted,

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